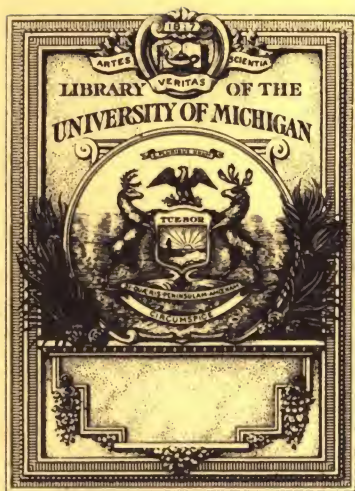




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A

Collection and Abridgement
OF
CELEBRATED
CRIMINAL TRIALS
IN SCOTLAND.

FROM A. D. 1536 TO 1784.

WITH
HISTORICAL AND CRITICAL REMARKS.

BY
HUGO ARNOT, ESQ. ADVOCATE.

*Quae scelerum facies, O virgo, effare, quibusve
Urgentur poenis? Quis tantus plangor ad auras?*

GLASGOW:
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P R E F A C E.

THE Criminal Records of a Country are an historical monument of the ideas of a People, of their manners and jurisprudence: and in the days of ignorance and barbarism, they exhibit a striking, but hideous picture of human nature. The records of Scotland, in particular, present such a frequent display of the extravagance of the human mind, as amuses the fancy after the wearisome detail of form, and the disgusting representation of guilt.

While those materials gratify curiosity, they also afford useful information. They show what bitter fruits are produced under the gloomy climate of a tyrannical Government, and a superstitious Priesthood; and they afford us ample ground of consolation, when we compare those bitter fruits with the blessings which we enjoy under a free government, and in an enlightened age.

To present these Trials unabridged, would be to fatigue the reader with tedious rubbish; and to deliver them without illustration or remark, would be to deprive them of that fund of entertainment and inform-

ation which they ought to possess: But the manner in which I thought it advisable to publish them has laid me under certain disadvantages, viz. the necessity of delivering my own opinion upon a variety of difficult and important cases; and of undergoing no inconsiderable degree of labour.

In the course however of my search, into voluminous, obscure, and mutilated Records, I derived great benefit and satisfaction, from the polite and cheerful assistance afforded me by the Gentlemen in all the Public Offices which I had occasion to consult; and in particular from that of Mr. NORRIS, Depute Clerk of Justiciary, and of the Messrs. ROBERTSONS, Keepers of the Records in the General Register, whose judicious and liberal aid greatly alleviated the trouble of my work, And if it shall be honoured with the public approbation, I shall think myself amply recompensed for the toil of a long and laborious research.

EDINBURGH, }
1st Aug. 1785. }

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A
COLLECTION
OF
CRIMINAL TRIALS.

OF TREASON.

*Trial of John Master * of Forbess, for conspiring to assassinate King James V. for exciting a mutiny in the King's host, and for attempting to sacrifice part of the army to the English.*

JOHN Master of Forbess, on the 12th of June, 1536, was accused by George Earl of Huntly, before the King and the Lords of the Privy Council, of the crime of Treason. The Treason charged was, that the accused had conspired† the King's death, by meditating to kill him with the shot of a culverin, when his Highness was in the borough of Aberdeen. The Master of Forbess protested his innocence, which he offered to maintain by single combat. The Earl of

* *Master of Forbess* is a Scottish phrase, signifying eldest son and heir-apparent of Lord Forbess, and so of the eldest son of any Baron.

† Records of Justiciary, 12th June, 1536.

1537 Huntly declared, that his informers were not present; but he would bring a *landed man, or gentleman*, who would avow the charge before the King any day his Highness would appoint, and, failing thereof, he took up the pledge.

The Privy Council having taken the Earl of Huntly bound, under the penalty of 80,000 * merks, to make good his accusation before the King, or the Court of Justiciary at Edinburgh, against the first of the ensuing month of July; they, at the same time, ordered a herald to charge the Master of Forbess to enter himself prisoner in Edinburgh Castle against eleven o'clock next forenoon, under the pain of Treason; or, at least, to find surety, to the amount of 20,000 merks, to stand trial on the day appointed; also, that, during his residence in Edinburgh, he should not approach nearer the Royal Palace than the Netherbow-port; and that, when it should please his Majesty to visit the town, the Master of Forbess should confine himself within his own apartments.

No further procedure was held in this matter till the 8th of December, when the King directed a warrant to the Privy Council, requiring them to give orders to the Justice Clerk to take surety from Lord Forbess, as well as the Master of Forbess, that each of them remain in Edinburgh Castle till they find bail, to the † extent of 10,000 merks, to appear and stand trial when called on.

* For the value of Scottish money in those times, see Arnot's Hist. of Edinburgh, p. 87, 90, &c.

† Rec. of Just. 11th December, 1536. 14th July, 1537.

On the 14th of July, 1537, he was tried for High 1537
Treason before the Earl of Argyle, Justice-General, and the Commissioners of Justiciary. The indictment contained several charges, ‘ That the prisoner
‘ was guilty, *art and part*,* of a treasonable and abominable conspiracy to perpetrate murder † upon the
‘ King’s most noble person, by the shot of a culverin,
‘ when his Highness was in his borough of Aberdeen,
‘ for the purpose of administering justice within the
‘ northern parts of his realm; that he was concerned,
‘ *art and part*, in the treasonable mutiny which arose
‘ in the last Royal army that marched to the borders,
‘ for national defence, against the English forces, the
‘ Scottish army being then at Jedburgh; and that he
‘ traiterously conspired the destruction of a part of
‘ the army raised to oppose the incursions and ravages of our ancient enemies of England, who were
‘ hovering upon the borders, to the imminent peril
‘ of the army, and to the great danger of the state;
‘ also, that he traiterously aided our said enemies of
‘ England.’

Fifteen persons, some of them men of distinguished rank, and all of them of respectable station, sat upon the jury. They were, Robert Lord Maxwell, William Master of Glencairn, Knight, Sir John Melville of Raith, John Hume of Coldenknows, George Crawford of Feddorat, Alexander Leslie of Pitcaple,

* *Art and part* is a phrase in the Scottish law, which denotes, aiding and abetting. It signifies the same with the Latin phrase, *ope et consilio*.

† The indictment is in Latin, the verdict in English.

1537 John Pantoun of Pitmidden, David Duncanson of Standanstances, John Leslie of Bouquhaine, Nicholas Ross of Auchlossin, James Garioch of Killstane, George Leslie of Newleslie, John Cumming of Cullen, Charles Dempster, and William Leslie of Coclarachie. The jury found him guilty of the whole crimes charged against him, article by article. Sentence was then pronounced upon him, 'forfeiting his life, lands, and goods, moveable and immovable; ordaining him to be *harted** through the causeway of Edinburgh, and hanged on the gallows, till he be dead, and to be quartered and dismembered as a traitor.'

Drummond of Hawthornden, and the later Scottish writers, have thought proper, for what reason I know not, to pronounce† decidedly that this was an unjust sentence. The following reasons, however, lead me to think, that we are by no means entitled to conclude that the jury returned an iniquitous verdict, which was to infer so dreadful a doom; and that our idea of the prisoner's innocence cannot exceed bare conjecture. The evidence given on his trial is not recorded in the books of Justiciary, nor was it in use to be taken down at that period; and the presumption surely is, that a jury would not, contrary to their conviction, sacrifice the life, fortune, and fame of a fellow citizen.

About this period two inveterate factions sprang up in Scotland. Lord Forbes was, perhaps, the very

* Drawn on a hurdle.

† Drummond's Hist. of the James's, p. 104. Scott's Hist. of Scotland, p. 344.

first man of rank in the north, *magnae familiae et factionis princeps*,* who professed the doctrines of reformation; hence we may suspect the partiality of succeeding writers when treating of this Lord and his family. Such of the proceedings against the prisoner as we still can distinctly trace, were neither harsh nor precipitate. The Earl of Huntly, the accuser, was ordained by the Privy Council to find surety, to the amount of 30,000 merks, to make good his accusation; whereas the prisoner, and Lord Forbess, by express warrant, under his Majesty's hand, were required to find surety only for 10,000 merks, to stand trial when called on. Upwards of thirteen months elapsed between the accusation and trial, a period surely sufficient for the abating of passion, and the investigating of truth. The prisoner was a man of impetuous temper and profligate life; a person who, although many believed him innocent of conspiring the King's death, although he denied it on the scaffold, yet the public hardly regretted his fate, on account of his profligacy and wickedness; and he himself acknowledged that he deserved to die for the murder of the Laird of Meldrum. Even in those barbarous times it was not uncommon for a prisoner to be acquitted by his peers of a charge of treason. Robert Lord Lisle was tried before the King himself, by sixteen Lords and Barons of Parliament,† who

* The case of Gowry affords a notable instance, that a champion of reformation was sure to find in his party advocates ready, not only to wipe off the imputation of conspiracy, but to retort the charge.

† 18th March, 1481. Arnot's Hist. p. 643.

1537 who pronounced him innocent of the treasonable correspondence with the English with which he was charged. And Archibald Douglass, when prosecuted for the treasonable murder of Darnley,* in the verdict of his jury, experienced the like justice, *or favour*. Two eminent Scottish historians were cotemporary with the Master of Forbess. At the time of his trial, Buchanan was thirty-one years of age; and Lesly, it is probable, was about the same period of life. They both mention the conspiracy to assassinate the King; but such is their inaccuracy, that neither of them takes notice of the charge of exciting a mutiny in the Scottish army, or that of a treasonable correspondence with the English. Lesly does not insinuate that the Master of Forbess suffered an unjust sentence,† but observes that his father, the Lord Forbess, after a tedious confinement in Edinburgh Castle, on the same account, upon a more minute investigation, was exculpated from every suspicion of guilt. The indecisive ambiguous report of Buchanan, that many thought the Master of Forbess innocent of meditating an assassination, at the same time that his other crimes rendered him deserving of death, is the slippery foundation on which the carelessness or partiality of later authors has reared the fabric of his innocence, glittering in distant prospect, but vanishing upon approach.

I present the reader with the passage from Buchanan. I will not degrade his stile by attempting to translate it. ‘ Joannes Forbosius, juvenis acer, et

* 26th May, 1586.

† Lesly de Reb. Gest. Scotor. p. 446.

‘*magnae familiae et factionis princeps*, ab Huntileio 1537
 ‘*aemulo creditur oppressus*. Erat enim quidam Stra-
 ‘*chanus*, homo ad quodvis flagitium promptus, mul-
 ‘*tos annos Forbosio valde familiaris*, et omnium ei
 ‘*nequiter patratorum aut conscius, aut particeps, aut*
 ‘*auctor*. Is parum (ut rebatur) ab eo pro merito
 ‘*cultus ad inimicum ejus Huntileium se confert*; et
 ‘*crimen capitale, vel ad eum detulit, vel (ut plurimi*
 ‘*putant) una cum eo confinxit*: Quod Forbosius vi-
 ‘*delicit, ante annos complures, de rege occidendo*
 ‘*consilium inisset*. Id crimen, quanquam nec satis
 ‘*firmis argumentis, nec idoneis testibus fuisset pro-*
 ‘*batum, et studia inimicorum in judicio neminem*
 ‘*laterent, 13 die Julii, a judicibus, magna ex parte*
 ‘*ab Huntileio conductis, damnatus, capite luit*. Sed
 ‘*ejus supplicium vulgo minus triste fuit, quod, etsi*
 ‘*criminis, ob quod poenas dederat, expertem homi-*
 ‘*nes credernt, tamen, ob superioris vitae facinora,*
 ‘*morte non indignum existimarent.*’*

*Mr. Archibald Douglass, Parson of Glasgow, for the
 Treasonable Murder of Henry King of Scots.*

ARCHIBALD DOUGLAS was cousin to James Earl of 1540
 Morton, Regent of Scotland. By him he was ap-
 pointed a Lord of Session on the 11th of November,
 1578; and, in the interval between the downfall

* Buchanani Hist. lib. 14. sect. 53.

† April 26, 1581.

1580 and execution of the Regent, he was dismissed from the bench.

On the 31st December, 1580, the Earl of Morton, and the prisoner, were both accused before the Privy Council of the murder of Darnley. The King sent privately to apprehend the prisoner, who was then at Norham; but he, having got intelligence of Morton's commitment,* fled to England; and Elisabeth, in the usual stile of her policy, refused to listen to James's repeated entreaties that she would surrender the prisoner to justice.

After being degraded from the bench, the Parliament pronounced, in absence, a decreet† of *forfaulture*‡ against him in the month of November, 1581. The same Parliament passed an Act of approbation of the Earl of Arran's|| proceedings concerning the murder of the King's father. This Act sets forth, that the Earl of Arran had accused ¶ the late Earl of Morton, and Archibald Douglass, as guilty, *art and part*, of the murder of Darnley; that Douglass, conscious of his guilt, had fled to England, and continued fugitive. And a solemn protestation was entered in Parliament § by many Lords, dignified clergymen, and barons, that nothing should be hereafter done contrary to the Statutes enacted in A. D. 1571, and

* Spottiswood's History, p. 310, 348.

† This decree is not entered in the rolls of Parliament.

‡ Forfeiture. || Captain James Stewart.

¶ Unprinted Acts, October 24, 1581. General Register.

§ The Act 1579, c. 36. prohibited and annulled all dispositions and alienations of goods or estates, made, or to be made, by any persons convicted, or to be convicted, of the murder of Darnley, or of the Regent Murray.

1579, concerning the murderers of the King's father, 1586 till his Highness should be of age.

At what time the prisoner returned to Scotland, I know not; but, if my notion of his trial be well founded, he returned in the well grounded confidence that all his powerful friends did not die with Morton.

While the King was yet a minor, the ministers and officers of state had the assurance to pass an act under the Great Seal,* restoring the prisoner, in his Majesty's name and authority, against the decree of Parliament *forfauling* him for the murder of the King's father. This act of *rehabilitation*, as it is called, contains, at the same time, an awkward and incongruous clause, declaring, that, if the prisoner should be found guilty of the murder, the act should be of no force or effect. On the 21st of May, 1586, within three weeks after the date of the former act†, the prisoner received a pardon under the Great Seal for all crimes and treasons committed by him, except the murder of the King's father, and five days after he was tried for that murder.

A commission was passed under the Quarter Seal, appointing Mr. John Prestoun,‡ and Edward Bruce, Advocates, Commissaries of Edinburgh, to sit in judgement upon the prisoner, who was brought to trial on the 26th of May, 1586. It was charged in the indictment, that the prisoner,§ in the months of

* Great Seal Records, May 1, 1586. † Ibid. May 21, 1586.

‡ Records of Justiciary, May 26, 1586.

§ In the indictment, he is designed Mr. Archibald Douglass, parson of Glasgow; but, in the *rehabilitation* and pardon under

1586 January and February, 1566, along with James late Earl of Bothwell, James Ormeston of *that Ilk*, Robert Ormeston his uncle, James Hay* of Talla, John Hepburn, called John of Bowtown, and sundry other accomplices, did conspire, and finally did determine upon, the murder and parricide of the late Henry King of Scots: that the prisoner, and the other persons mentioned, by themselves, their servants, and their accomplices, were guilty of perpetrating, aiding, and abetting, the treasonable murder of Henry, and of William Tailzeor, and Andrew Mackaig, his groomst† of the chamber, in a lodging beside the *Kirk of Field*, in the burgh of Edinburgh, upon the 10th of February, 1566, about two hours past midnight: that they burned the house, and blew it up in

the Great Seal, he is further designed one of the ordinary Lords of Session, notwithstanding he appears to have been dismissed from the bench in April, 1581.

* It was this James Hay of Talla and John Hepburn who actually set fire to the match. The Earl of Bothwell, and others of his accomplices, waited in the court-yard. As it was a quarter of an hour ere the house blew up, the Earl grew impatient, dreading that the match was not rightly kindled, and would have gone into the house to see if the match was burning, had he not been prevented by Hepburn. The conspirators saw the house *rise in the air*, heard the crack, and ran off; Bothwell hied himself down to his lodgings in the palace of Holyroodhouse, and went to bed for half an hour, till the event, which he so well knew, was announced, the news having reached the palace. (See the depositions of four of the conspirators who suffered for this crime, Anderson's Collections, vol. ii. p. 165.) No mention is made in these depositions of the prisoner Douglass having been present.

† The phrase in the libel is *cubicularis*.

the air, by the force of gunpowder, which, for that purpose, they had recently conveyed into vaults, and other low and dark places under ground: that, thereby, the prisoner had incurred the pains of treason, and ought to be punished by the loss of life, fortune, and fame: that, further, he was in the treasonable foreknowledge of the crime, and concealed it, by which he had incurred the like penalty: that, as another circumstance of his being guilty, *art and part*, of perpetrating the said murder, he, in the hurry and bustle which accompanied that deed of darkness, *tint his mælis*,* which next day being found upon the spot, were acknowledged to be his; that his guilt was farther confirmed by his flight into England, to which he had recourse when summoned before the Privy Council to answer for this crime: that he remained in England several years, which was a tacit acknowledgement of his guilt, and that, in November, 1581, he underwent a sentence of forfeiture for the said crime; that his intimate friend, John Binning, who was convicted and executed for the murder in June, 1581, did frequently depose and declare, that the prisoner was guilty, *art and part*, of the crime, and did actually devise and perpetrate the same; and that Binning repeated this declaration in presence of the whole people at the place of his execution: and, *lastly*, that James Earl of Morton before his death confessed his foreknowledge of the murder, and declared it was the prisoner who revealed the same to him, and that he, the prisoner, was actually present at the committing of the murder.

* *i. e.* Lost his slippers.

1586 The indictment being read, the prisoner produced a warrant from his Majesty, directed to the justices, requiring them to admit his lawful defences. He declared, that, trusting to his innocence, he desired no prolocutor; and he pleaded, that the charge of foreknowledge of the murder, and concealing the same, ought not to pass to the knowledge of an assize, in respect of his Majesty's pardon; and the Court sustained this plea. The Court then proceeded to name a jury, when an unusual obstacle to the trial occurred. Of the persons summoned to be upon the jury, a sufficient number did not give obedience to the citation. The absent jurymen were fined, and the trial stopped; but, from whatever cause the absent persons declined to sit on this jury, the prisoner had no mind that the trial should be interrupted. Nor was the court hostile to his wishes. It continued to sit in a pause till a precept directed to the justices and advocate-substitute was procured from his Majesty, and produced by the prisoner. This precept set forth, that the prisoner *was presently entered in pannel,** to stand trial for the murder of Henry; that the trial stopped through the not appearing of a sufficient number of jurors; and it required the judges and King's counsel to supply the number of the absents by such gentlemen as happened to be at the bar, or in the court. The advocate-substitute desired that this precept might be entered in the process as his warrant, and trial proceeded.

The nine jurymen who appeared, in consequence of their summons, were Patrick *Master of Gray*,

* Produced at the bar.

chancellor (*i. e.* foreman) of the jury, James Colvill 1586 of Easter Weemyss, *Robert Logan of Restalrig*, Andrew Gray of Dunynald, Andrew Logan younger of Cotfield, Gilbert Gray of Baldinran, Mr. Samuel Cockburn of Templehall, George Home of Spott, Patrick Johnston younger of Elphinston. Those who were picked from the bar, and added to the list, were William Ker younger of Ancrum, Alexander Baillie of Littlegill, Master Robert Fawside younger of that Ilk, Gavin Carmichael of Wrichtslands, James Logan of Parsonsknows,* Andrew Ker of Greenhead, George Hamilton of Preston, and Walter Ker, brother to the Laird of Greenhead.

Seventeen jurymen sat on this trial; this was uncommon, but not unprecedented.† Nineteen were summoned to be upon it, of whom *nine* only obeyed the citation. The ten who absented themselves were, Sir Archibald Napier of Edenbellie, Knight, Sir John Edmestoun of that Ilk, George Home of Wedderburn, Alexander Dalmahoy of that Ilk, — Mowbray of Barnbogle, Francis Douglass of Borg, Thomas Otterbourne of Redhall, George Home of Broxmouth, Robert Lord Seytoun, and Patrick Cargill of that Ilk. They were fined £14 each for their disobedience.

It might naturally be expected, with regard to persons even in the respectable sphere of life to which these jurymen belonged, that the lapse of two hun-

* Parsonsknows was a part of the estate of Restalrig. It is the spot on which the house of Mr. Alexander Robertson, one of the principal clerks of session, is now built.

† Craig de Feudis, p. 49.

1586 dred years should have consigned their actions, their characters, and their attachments, to oblivion. This, however, is far from being the case; and, from the circumstances concerning the jurymen which I am still able to trace, I am confirmed in the notion, that this was a collusive trial, devised with no other purpose than to screen the prisoner from the consequences of guilt; a notion strongly suggested by the royal pardon and act of *rehabilitation*, the shyness of jurymen to sit upon the trial, the prisoner's *producing*, and in all probability *procuring* a royal precept to force on the trial, by supplying the absent jurymen with those persons who happened to be at the bar, or in the court, the former of whom, it must be presumed, were his friends; and finally, by the jury's returning a verdict, which seems contrary to fact; perhaps also to law and evidence. However infamous, however astonishing it may appear to us, yet one of the original jurymen who were summoned on this trial, George Home of Spott,* on the 16th of June, 1582, was himself tried and acquitted for this individual murder. And in his indictment, it was directly charged, that he was guilty of the murder; or, at least, that he had previous knowledge of it, and concealed the same, *and perfectly knew that the prisoner, and John Binning, the prisoner's servant, were perpetrators of the murder.* Another of the jurymen was Robert Logan of Restalrig, who was convicted and forfeited for his concern in Gowry's†

* MS. Abstract of the Records of Justiciary in the Advocate's Library, vol. i. p. 113.

† Spottiswood's History, p. 457, 509; Robertson's History, vol. ii. p. 258.

conspiracy. A third person, the Master of Gray, ¹⁵⁸⁶ chancellor* of the jury, in the course of that very year, was sent by King James ambassador to England to intercede for Queen Mary's life. On this embassy, so *faithfully* conducted, so *fortunately* terminated, Douglass the prisoner had been formerly sent: but his fidelity being suspected, the Master of Gray, and Sir James Melville, were appointed to supersede him; and the languor or duplicity of the prisoner's conduct yielded in point of treachery to the conduct of Gray his successor. Instead of interceding for the captive Queen, the Master of Gray urged Elizabeth to execute the sentence, reminding her of the mean adage, *Mortui non mordent*. He was sentenced for his treachery to perpetual banishment; and finally, he acted as Queen Elizabeth's spy in Italy.†

* Robertson's History, vol. ii. p. 167, 182, 246. Append. No. 13, 14.; Spottiswood, p. 351, 352, 353. Spottiswood is here inaccurate. He addresses a letter of the King to the Master of Gray, which was truly addressed to the prisoner, and dated long before Gray set out on his embassy.

† To throw every light on this mysterious trial, as well as the subsequent trials of the Earl of Gowry, and Logan of Restalrig, it may not be amiss to state the following genealogical anecdotes, as they will further illustrate the affinity between the families of Gowry, of Gray, of Logan of Restalrig, of Colville of Easter Weemyss, and Johnston of Elphinston. Several persons of the name of Gray and Logan were upon the jury, and three of the name of Ker. The Kers and the Logans were nearly allied: This William Ker younger of Ancrum, had an aunt, Janet Ker, who got certain lands * from her father, A. D. 1519. And in the family vault of Logan of Restalrig, there still remains a stone

* Douglass' Peerage, p. 413, 419.

1586 The counsel for the prosecution, in order to prove the indictment, produced the process of forfeiture for this crime, led in Parliament against the prisoner, and sentence following upon it, in November, 1581.

The prisoner, in his defence, denied *simpliciter* the first article of the libel,* *viz.* the actual murder, and being concerned in it, *art and part*. As to the losing his *mwles*, he averred it to be false, and required the same to be proved by any person who was present at the finding of them, or who had seen them at any time from that period to the present hour; that the circumstance of losing his *mwles* could not be instructed by Binning's deposition, declaring that

bearing this inscription,† ‘*Lady Janet Ker, Lady Restalrig, quha departed this life, 17th May, 1526.*’ They were again allied to the person of Robert Logan himself, whose Lady's name was Marion Ker.‡ William, second Lord Ruthven, who died A. D. 1553,|| had a daughter, Barbara, married to Patrick, sixth Lord Gray, father to the *Master of Gray*, who sat on this jury. He had another daughter, Margaret, married to James Johnston of Elphinston. William's son, Patrick, third Lord Ruthven, who was concerned in the murder of Riccio, had a daughter, Isobel, married to Sir James Colville of Easter Weemyss. Patrick, sixth Lord Gray, and father to the celebrated Master of Gray, married Barbara Ruthven, sister to Patrick, third Lord Ruthven, and aunt to William, first Earl of Gowry. Agnes Gray, sister to the sixth Lord Gray, and aunt to the *Master*, was married to Sir Robert Logan of Restalrig, father to Robert Logan, who was forfeited for Gowry's conspiracy.

* *Libel* is the Scottish law term for *indictment*.

† Arnot's Hist. of Edinburgh, p. 257.

‡ Record of Signatures, 15th July, 1607, 6th April, 1620.

|| Douglass' Peerage, p. 305, 314.

the prisoner went forth, armed in his *secret* * and 1586 *steel bonnet*, to the committing of that horrible crime; for the road between the prisoner's lodging and the place where the murder was committed, was by no means fit for an armed man "to pass with † *well wadded mules to sick a deed*:" that, in all probability, no such thing was found there, and that it was but a mere fiction. As to the inference of guilt, drawn from his flight into England, upon getting intelligence that he was accused before the King and Privy Council of this treasonable crime, on the last day of December, 1580, and his shortly afterwards being forfeited for the same, he declared that he absented himself from the realm out of a just fear, which would have moved any man; for his whole goods and possessions 'had been intromitted with, before any attaching;' but that, speedily after his leaving the realm, and as soon as he got information that he was charged with this horrible crime, of which he was innocent, he instructed the Queen of England's ambassador in Scotland, for the time, to offer, in the prisoner's name, to present him to the King, that he might stand trial, 'upon condition that there should be deputed unsuspected judges and persons of assize;' whereunto his Highness answered, 'That he would not indent with his subject.' As for the process of forfeiture produced, it could nowise tend to his conviction, in respect of the letters of *rehabilitation*.

To this the King's advocate answered, and the

* *Secret* is an old Scottish word for an under coat of defence, probably made of wire.

† In velvet slippers to such a deed.

1586 answer was solid, That the letters of rehabilitation could not restore the prisoner against the sentence of forfeiture, which being pronounced by Parliament, and remaining unreduced, could not be done away by any other authority than that which established it; and this he desired might be attended to by the jury. For verifying the indictment, he further produced three declarations and depositions, emitted before the Privy Council by John Binning, late servant to the prisoner, on the 10th, 11th, and 15th May, 1581. In these depositions, which were authenticated by the subscriptions of the great officers of state, the deponent firmly and constantly swore, that the prisoner '*passed to the deed doing, the said John Binning and Thomas Gairner, his servants, being with him in company.*' The pursuer produced three other depositions, one by the late James Ormestoun of that Ilk, another by the late John Hay of Talla, and a third by the late Paris, a Frenchman.

The prisoner argued, that John Binning's depositions could not militate against him, because they were self-contradictory, the deponent sometimes declaring that the prisoner had gone to his bed on the night of the murder, and that the deponent left his master's chamber and went to his own dwelling-house, where he was taking his repose while that horrible murder was perpetrating; and that, '*hearing the crack of the blowing of the King's house in the air with powder, he rose and came to his master's chamber, where he found him—lying on his bed, reading on a book.*' But declaring, in another part of his deposition, that, on the night of the murder, the prisoner, after supping in his own apart-

ment, nobody being with him but the deponent and 1586 Thomas Gairner, both his servants, went out at the back door of his house to the committing of the murder, accompanied by these his servants: that there was another inconsistency in the deposition; for Binning declared, that, on the next day, he attended his master to the tolbooth, *i. e.* to the Court of Session, which was impossible; for the night of the murder was that of Sunday preceding Fastern's Even, which was vacation time, when the Lords did not sit: further, that the prisoner was not then raised to the bench; and that Binning was not his servant at the time of the murder, nor did he come to his service for two years after; and he pressed it upon the assize to mark these inconsistencies and contradictions.

The King's advocate answered, that the deposition of Binning was sufficient to testify the libel to be true; for that, in all the material parts of his evidence, he declared the prisoner to be participant in the murder. The prisoner replied, that Binning was but a *single witness*, which was not sufficient to convict, in a civil action, far less to infer condemnation for a capital crime. He pleaded further, that the confession* of the Earl of Morton ought not to be regarded, for the same had not been produced in Parliament, when the sentence of forfeiture was pro-

* This confession was supposed at the time not to have been produced on purpose to afford the jury a pretext for acquitting the prisoner. And the contrivance and success of this collusive trial were imputed to the intrigues of the Master of Gray, and of Randolph, the English ambassador. *Moyes's Memoirs*, p. 108, for A. D. 1586.

1586 nounced against the prisoner; neither was it now laid before the jury; and, besides, the confession was emitted after the Earl's condemnation, consequently it was that of a person *dead in law*. Finally, he alledged that the depositions of Ormeston, Hay, and French Paris, far from criminating him, testified his innocence; for that these deponents described the whole circumstances of the *murder committed by themselves and their accomplices*, without making any mention of him. The argument was finished by a reply from the King's advocate, in which he maintained, that the deposition of Binning, to which he adhered at the hour of death, together with the notoriety of the fact, and the confession of the Earl of Morton, which was '*more than notorious*' to the assize, and to the whole country, and consequently needed no production, were more than sufficient to convict the prisoner: and he protested for an *assize of wilful error*, if the jury should *cleanse and acquit him*.

Sir William Stewart, son to Lord Ochiltree, also appeared at the bar, and, as near cousin and kinsman to the King, set forth, that in respect of the prisoner's being convicted in Parliament, of *art and part* in the treasonable murder of Henry, if the jury should acquit him, he protested for an assize of wilful error. And the prisoner protested in the contrary, in respect of his answers, defences, and letters of rehabilitation.

The jury withdrew, chose the Master of Gray their chancellor, and all in one voice found the prisoner *clean and acquit of being in company with Bothwell, Ormeston, Hay, Hepburn, and their accomplices, in committing the crime as libelled*. The jury then in-

serted their reasons for acquitting the prisoner, and 1586 these were merely a recapitulation of the arguments urged by him in the course of the trial. Only they mention a third person to have been killed in the King's lodging, one William Glen, who was one of his Highness's grooms of the chamber, as well as William Tailziour, and Andrew Mackaig, mentioned in the libel.*

To this account, taken from the public record, I beg leave to subjoin Archbishop Spottiswood's opinion of the trial. 'In the estate,' says he, 'matters went not much better at this time, and amongst others, nothing gave more offence than the acquitting of Mr. Archibald Douglas, by form of assize. This man was known to be guilty of the murder

* In the brief account of the trials of Binning and Home of Spott, that is given in the abstract MSS. of Justiciary Records, there is not a word either of proof or argument. That I might throw every possible light on the trial of Douglass, I endeavoured to have recourse to the original record; but the volume of Records, or *Book of Adjournal*, (as it is termed,) containing the proceedings from 20th December, 1580, to 27th November, 1584, is not to be found. This vexed me the more, as Binning having been tried on the 3d of June, 1581, and the Earl of Morton having been tried before that same Court, on the very day preceding, I flattered myself with the hope of giving that trial to the public; but, from a note in the abstract MSS. taken from the volume now missing, I find that Morton's trial was not entered on the Record. MSS. Abstracts, p. 111, 113, 118. I also searched the Records of Privy Council and Justiciary, with a desire of examining their proceedings in A. D. 1567, being the year in which Ormeston, Hay, Hepburn, &c. were condemned and executed for the murder of Darnley: and I can hardly persuade myself that it is owing to accident that the records of both these Courts for this year are also missing.

1586 ' of the King his father, and had fled into England
w ' six years before. The Earl of Morton, at his death,
' and one Binny, Mr. Archibald's own servant, who
' was executed about the same time, did both de-
' clare, that he was present at the doing of that wic-
' ked fact, for which the King had often, by his let-
' ters and ambassages, intreated the Queen of Eng-
' land to have him delivered, yet could not obtain it.
' At this time a remission being purchased to him for
' the concealing of that murther, with a letter of re-
' habilitation, whereby he might stand in judgement
' and plead against his forfeiture, he was in a jury
' held the 26th of May declared innocent, and ab-
' solved of the crime.

' This was done by the procurement of the Prior
' of Blantire, who had obtruded himself in the Par-
' sonage of Glasgow, whereof Mr. Archibald had
' been titular, and otherwise than by his restoring
' could have no right in law to retain it. Many were
' grieved to see justice in that sort abused, for main-
' taining a sacrilegious possession; but to have sent
' him (Mr. A. Douglas) back to England, with a com-
' mission to reside there as ambassador for the King,
' which likewise was done, was an errour inexcuse-
' able; and how he, and the Master of Gray, who
' was chiefe man in that led assise, carried themselves
' in the Queen of Scotland's businesse, wherewith
' they were trusted, we will hear in the end of this
' year.*

* Spettiswood's Hist. p. 347.

*John Earl of Gowry, and Mr. Alexander Ruthven,
for conspiring to bereave his Majesty of life, at St.
Johnston, 5th August, 1600.*

THE Majesty of Rome had subsisted for many ages, 1600 and her sway extended over the fairest part of the globe, ere the punishment of treason was inflicted after the death of the traitor. And it was not till the division of the empire between Arcadius and Honorius, a period when the weakness of government increased its jealousies and its severities, that a sentence of infamy could be pronounced after death for that crime, and an action brought for wresting the estate from the heirs of the traitor. With a similar policy, James V. who had long been harrassed by his nobles, solemnly adopted this punishment as a part of our law, when he beheld the storms that were gathering round the throne from the enthusiastic spirit of religious and civil liberty that sprang up at the reformation.*

Sir Thomas Hamilton, King's advocate, produced before the Parliament, on the 4th of November, 1600, a summons of treason, duly executed, against William Ruthven, brother, and apparent heir, to the Earl of Gowry, and to Mr. Alexander Ruthven; and against his tutors and curators, and all having interest, to hear it found and declared that the said

* Digestorum, lib. 48. tit. 4. lex. 9.; Codicis lib. 9. tit. 8. lex. 5. et seq. A. D. 397; James V. Parl. 6. chap. 69. A. D. 1540.

1600 Earl, and Mr. Alexander, had committed treason, by attempting to bereave his Majesty of life, on the 5th of August, 1600. The summons, which contains a minute narrative of the transactions of that busy day, is dated on the 26th of August, precisely three weeks after the date of the conspiracy, and the day of appearance was the 4th of November, an interval sufficient for people's minds to cool after so great an event, for the defenders preparing their defences, and for investigating the truth.

The execution of the summons was certified when it was first laid before Parliament. It was produced a second time on the 11th of November. On the 15th, the Parliament resumed the cause; and the Lord Advocate produced the following depositions that were taken before the *Lords of Articles*.*

Andrew Henderson, chamberlain to the late Earl of Gowry, deposed, that, on the night of Monday the 4th of August, he, after supper, was in the Earl of Gowry's own chamber with his Lordship and Mr. Alexander Ruthven. The Earl asked him, What he had to do to-morrow? to which he answered, to ride to Ruthven to speak with the tenants. His Lordship desired him to postpone that journey, and to be ready by four in the morning to attend Mr. Alexander to Falkland; to take Andrew Ruthven with him; to

* The *Lords of Articles* were a committee of the different estates of Parliament, who prepared the business that was to come before the House. They were this year chosen on the 11th of November; the depositions were produced in Parliament on the 15th; they must therefore have been emitted between the 11th and the 15th.

make haste back with what *answer* his Lordship's 1600 brother should order, and to leave Andrew with Mr. Alexander. They set off at the hour appointed, and arriving betimes at Falkland, the Master sent the deponent at seven o'clock to see what the King was doing. He found his Majesty in the court-yard booted, upon which he returned to the Master, saying, 'Haste you, the King is coming forth.' The Master immediately followed his Majesty, spoke with him for about a quarter of an hour, and, during the conversation, the King frequently clapped him on the shoulder. The Master then bid the deponent ride in all haste to Perth, as he loved Lord Gowry and his honour, and acquaint him that the King would be there with a *slight retinue* speedily, and tell the Earl to cause dinner be prepared for his Majesty. The deponent got back to Perth about ten o'clock, when his Lordship enquired anxiously what answer he had brought; what reception his brother had from the King; and what number of persons was hunting with his Majesty? The deponent* said, the answer was, to prepare dinner for the King: that the reception his brother had was courteous; and that there were sundry of his Majesty's household, and some Englishmen, hunting with the King. The Earl asked what noblemen were with the King? to which he answered, 'none but my Lord Duke.'† He then went to his own house and put off his boots, and, upon his return, the Earl ordered him to put on his, the de-

* Register of Parliament, November, 1600; Cromerty's Account of Gowry's Conspiracy, p. 38. *et seq.*

† The Duke of Lennox.

1600 ponent's, coat of mail, and plate sleeves. He asked for what purpose? The Earl answered, he had a Highlandman to take in the Shoegate.* About half past twelve his Lordship bid him bring up dinner. The Earl sat down to dinner with three gentlemen, and, while the first course was on the table, Andrew Ruthven returned from Falkland, and whispered to his Lordship. Soon after, Alexander Ruthven and William Blair came to the Earl, while sitting at dinner, upon which the company instantly rose from table; and my Lord bid the deponent send for his steel bonnet and gauntlet. My Lord then went to *the Inch*,† and soon returned with the King, the Duke of Lennox, and the Earl of Marr. After his Majesty came to the house, *the Master* of Ruthven asked the deponent for the key of the gallery chamber, who answered, he had not handled it since the Earl came to Scotland. He then went, at *the Master's* desire, and got the key for him from Mr. William Rynd. Immediately upon his Majesty's sitting down to dinner, the Earl spoke privately to the deponent in the room where the King dined, bidding him go to the gallery to his brother. He went; the Earl followed; and they being all three in the chamber, my Lord said to the deponent, *tarry with my brother, and do what he bids you.* The deponent then asked the Master's commands, which were, to 'go into the round 'of the chamber,' into which the Master locked the deponent, and took the key along with him. Here he remained locked up, accoutered in his coat of

* Shoe Lane.

† A level field used as a mall, adjoining to Perth, on the road to Falkland.

mail, plate sleeves, sword and hanger, but wanting 1600 his steel bonnet. All the while he dreaded that some mischief was to be done; and he kneeled, and prayed to God. In about half an hour, Mr. Alexander returned; entered the chamber first, having the King by the arm, put on his hat, drew the deponent's hanger, and addressing the King, said, '*Sir, you must be my prisoner; remember on my Father's death.*' And, as he held the hanger at his Majesty's breast, the deponent wrenched it out of his hand. The King said, 'Mr. Alexander, ye and I were very great together; and, as touching your father's death, Man, I was but a minor.' The King added, '*al- though ye bereave me of my life, ye will not be King of Scotland, for I have both sons and daughters.*' Mr. Alexander answered with a great oath, it was not his life that he desired, but a promise to his brother the Earl. The King said, fetch hither your brother; and Mr. Alexander stipulated, that the King should not cry, nor open the window till his return, and then went away, and locked the door after him. Upon this the King asked the deponent, 'How came ye in here, man?' and this deponent answered, 'As God lives I am shut in here like a dog.' The King said, 'Will my Lord of Gowry do me any evil, man?' This deponent answered, 'I vow to God I shall die first.' He then, at the King's desire, went to open the window; but, before he got it opened, Mr. Alexander returned, and said to his Majesty, 'By God there is no remedy;' then leaped upon the King, and gripped both his hands, he, Mr. Alexander having a garter in his. Then the King said, 'I am a free Prince, man, I will not be

1600 'bound.' So his Majesty cast loose his left hand from Mr. Alexander, and, at the same time, the deponent drew away the garter, and the King leaped out of his grip. He then threw his left arm round the King's neck, and crammed his right fist into his mouth; and his Majesty and he wrestling, the deponent pulled his hand out of the King's mouth. The deponent then reached over the King's shoulder, and pulled up the board of the window, and his Majesty cried, 'Treason! treason!' Mr. Alexander spoke thus to the deponent, '*Is there no help with thee? Woe worth thee, thou villain, we all die!*' Then he clapped his hand to his sword; but the King putting his hands on the Master's, stopped him from drawing it. Thus struggling, they staggered forth of the cabinet into the chamber; the door of which the deponent unlocked, that he might make his own escape, and let in the King's servants. Just as he opened it, John Ramsay entered, *with a hawk on his hand, drew his hanger, and laid about him.* The deponent then went down stairs, and, as he came to the front gate, the Earl of Gowry was standing before the gate, accompanied by sundry persons, having the deponent's helmet on his head, and a drawn sword in * each hand. The deponent then went to his own house, where he remained till the King left the town. After this, he went to the bridge, and walked up and down about an hour. When he re-

* It was common, at this period, for combatants to fight with weapons in each hand; Lord Gowry had been long in Italy, and probably was a good swordsman. Arnot's Hist. of Edinburgh, p. 70.

turned home, his wife asked at him, ‘What trouble 1600
 ‘was within *the place?*’ To whom he answered, *Well is me* of one thing, that, if I had not been
 ‘there, the King had been twice sticked* this night:
 ‘but woe’s me for the thing that is fallen out.’ The
 deponent added, that, being met by Mr. John Mon-
 crieffe on his return from Falkland, who asked,
 Where he had been, seeing his boots were on? He
 answered, some miles beyond Erne, not daring to
 unfold the particulars, as the Earl had forbid him to
 tell the errand.†

The Duke of Lennox deposed, that, on the 5th of
 August last, being in company with the King at
 Falkland, he saw Mr. Alexander Ruthven speaking
 with his Majesty before the stables, between six and
 seven in the morning. Soon after the King went a
 stag-hunting; and having killed a buck in the Park
 of Falkland, he desired the deponent to accompany
 him to Perth, where he meant to have some con-
 versation with the Earl of Gowry. The deponent
 immediately sent his servant for another horse, and
 for a sword, and followed the King. When he over-
 took his Majesty, Mr. Alexander was speaking with
 him. Shortly after the Duke’s coming up, the King
 rode aside, and said to the deponent, ‘Ye cannot
 ‘guess, Man, what errand I am riding for; I am
 ‘going to get a *pose†* in Perth: and Mr. Alexander

* Stabbed.

† All the depositions are subscribed by the respective witnesses.

‡ A hidden treasure. This was by no means so improbable a
 tale, as one, from merely viewing modern manners, would deem
 it. The King was given to understand that this strange man was
 an emissary of the Court of Spain, furnished with a quantity of

1600 ' Ruthven has informed me that he has found a
 ~~~~~ ' man that has a pitcher full of coined gold of great  
 ' sorts.' The King at the same time asked the de-  
 ponent what sort of a man he took Mr. Alexander to  
 be; who answered, ' That he knew nothing of him,  
 ' but as of an honest discreet gentleman.' The King  
 afterwards described to him minutely the circum-  
 stances of *the pose*; to which the deponent answered,  
 ' I like not that, Sir, for that is not likely.' As they  
 rode by the bridge of Erne, his Majesty said, ' That  
 ' Mr. Alexander desired him to keep the matter of  
 ' the *pose* secret, and take nobody with him.' But  
 the King, both at that time, and in the Earl of  
 Gowry's Hall at St. Johnston, bid the Duke *take*  
*taint* (i. e.) take heed where I pass with Mr. Alex-  
 ander Ruthven, and follow me. When the King  
 was within a mile of Perth, Mr. Alexander rode on  
 before the company, on purpose, as the deponent be-  
 lieves, to advertise the Earl of his approach; and,  
 when they were within two *pair of butt-lengths* of  
 the town, the Earl, accompanied by diverse persons  
 on foot, came out to meet the King. Then his Ma-  
 jesty, accompanied by the deponent, the Earl of  
 Marr, Abbot of Inchaffrey, Sir Thomas Erskine,\*  
 the Laird of Urquill, James Erskine, William Stu-  
 art, Sir Hugh Harries, Sir John Ramsay, John Mur-

gold for the purpose of exciting fresh commotions. When the  
 Earls of Huntly, Bothwell, and Crawford, were tried for various  
 points of treason, A. D. 1589, they (and in particular the Earl  
 of Bothwell) were convicted of receiving from certain Jesuits,  
 and from Graham of Fintry, large quantities of Spanish gold,  
 for the purpose of raising forces. Rec. of Just. May 24, 1589.

\* Created Earl of Kellie.



ray, John Hamilton of Grange, and John Graham <sup>1600</sup> of Balgowan, passed altogether to the Earl of Gowry's hall, in company with his Lordship and Mr. Alexander Ruthven. The King called for a drink, which was long of being brought to him; and it was an hour ere his dinner was served up. When the desert was on the table, Lord Gowry came to the deponent, and the other persons of his Majesty's suite, and desired them to dine; which they did accordingly in the hall. When they had nigh dined, the Earl came to them from the King's chamber, and called for wine, saying, he was directed from his Majesty's chamber to drink the King's health, to my Lord Duke and the rest of the company. Immediately after the health was drank, the deponent rose from table to wait on the King, conform to directions; but the Earl said to him, his Majesty *was gone up quietly some private errand*. His Lordship then called for the key of the garden, into which he walked, in company with the deponent and some others. Soon after, Mr. Thomas Cranston came to them, crying, 'The King's Majesty is on horseback, and riding through the Inch.' Then the Earl cried, 'Horse! Horse!' Cranston answered, 'Your horse is in town.' His Lordship made no reply, save continually crying, 'Horse! Horse!' The deponent and the Earl came first out of the garden, through the hall, to the close; and, as they came to the outer gate, the deponent asked at the porter if the King was gone forth, who answered, that assuredly he was not. The Earl said, 'I am sure he is first always. Stay, my Lord, drink, and I shall go up, and get the verity thereof.' Immediately he came down again, and affirmed that the

1600 King was gone out at the back gate, and away. Upon this the deponent, the Earls of Gowry and Marr, with the rest of the company, went out at the front gate; and, as they were standing there in the street, deliberating where to seek the King, the deponent heard a voice, and said to the Earl of Marr, *'This is the King's voice that cries, be where he will.'* So they all looked up to the lodging, and saw his Majesty *'looking forth of the window, wanting his hat, his face red, and an hand griping his cheek and mouth, and the King cried, I am murdered! Treason! My Lord Marr, help, help!'* Instantly the deponent, Lord Marr, and the company, ran up stairs to the gallery chamber, where his Majesty was, to have relieved him; but the door was fast. Seeing a ladder, they rushed it against the door; but the ladder broke. They then sent for hammers; and, notwithstanding they thundered at the door with large forcing hammers, they got no entrance, till the Earl of Gowry and his brother were both slain. When they got admission, by assistance of those within the chamber, who helped them to break open the door, they found Lord Gowry lying dead, his brother, Mr. Alexander, being slain, and carried down stairs before their entry. When they entered the room where the King was, the deponent saw, through one of the doors, which was by no means close, the pushing of halberts and swords; but knew none of the combatants save Alexander Ruthven of Freeland; and how soon the said Alexander heard my Lord Duke's voice, he and his accomplices left that door, and gave no further disturbance. Depones, That he saw several of Lord Gowry's servants in arms in the

close, both before and after the King dined, and that 1600 there was a tumult before the Earl's lodgings, and in the High Street, for about two hours after his Lordship's and Mr. Alexander's death.

The Earl of Marr's evidence, in most things substantial, corroborated that of the Duke of Lennox.

The Abbot of Inchaffrey deposed, That he saw Mr. Alexander Ruthven at Falkland in conference with the King, for about a quarter of an hour, on the morning of the 5th of August. The deponent accompanied his Majesty to Perth, and dined in the Earl of Gowry's. After dinner, the deponent heard that the King had taken horse, and was gone towards Falkland, and the Earl assured the company it was so; upon which the Duke of Lennox, the deponent, &c. called for their horses. As they waited for them, they heard a voice, and the Duke said, 'Yon is his Majesty's voice, be where he will.' Immediately they saw his Majesty looking out of a window, without his hat, his face red, and crying, 'Help, my Lord Marr! Treason! Treason! I am murdered!'

The Abbot of Lindores deposed in all things agreeable to the evidence of the Duke of Lennox; adding, that, when the company asked if the King was gone forth, the porter said he was not. The Earl affirmed, he had gone out by the back gate; to which the porter replied it was impossible, for he had the key of that gate. When the King called out of the window, 'Treason!' James Erskine laid hands on the Earl upon the High Street; Sir Thomas Erskine also gripped him, saying, 'Fie, traitor! this is thy deed; thou shalt die.' To which Lord Gowry answered,

1660 'I know nothing of the matter.' A scuffle then ensued: the Earl drew both his swords, and cried, 'I will either be at my own house, or die by the gate;' and, at the head of about thirty persons, he made his way into the place.

Sir Thomas Erkin's testimony confirmed those of the two preceding witnesses. He added, that, when he had got into the close, meaning to fly to his Majesty's assistance, Sir John Ramsay called to him to come up the *turnpike* \* stair to the very top. When he had got up five steps, he met Mr. Alexander Ruthven, who was bleeding in the face and neck. Sir Hugh Herries, and others who were with him, cried, 'This is the traitor! strike him!' He was struck accordingly, and fell; and, as he was fallen, he turned his face, and cried, '*Alace! I had not the wit† of it!*' The deponent then went up stairs to the chamber at the head of the gallery, where were the King and Sir John Ramsay only; Sir Hugh Herries and a servant followed him; immediately after, Mr. Thomas Cranston entered the chamber with his sword drawn, the Earl of Gowry following, with a drawn sword in each hand, and a helmet on his head. They struck at the deponent and his colleagues, who defended themselves and struck again, and Cranston wounded the deponent in the right hand. At last, Sir John Ramsay gave the Earl a deadly stroke. The Earl leaned to his sword; a man held him up; but how soon his Lordship fell, Cranston and the rest of his followers left the room.

\* The name given to a winding stair, very common in Scotland.

† Blame of it.

Sir John Ramsay deposed, that, after having dined 1600 on the day libelled in the Earl of Gowry's, he took his Majesty's hawk from John Murray, in order that the said John might dine. Missing the King, he and the Laird of Pittencrief searched for his Majesty in different apartments; and, when they came into the close, Mr. Thomas Cranston told them the King was on horseback, and at the Inch. The deponent then run to the stable for his horse, and, as he was at the stable-door, he heard the King's voice, but did not understand what he said. He immediately returned, and, entering the close, he found a *turnpike\* door* open, into which he entered and went up stairs. Hearing a struggle and din of feet, he run with his whole force against the door which enters from the stair to the chamber at the end of the gallery. Having burst open the door, he saw the King and Mr. Alexander Ruthven striving and wrestling; his Majesty having Mr. Alexander's head under his arm, and Mr. Alexander, who was almost on his knees, had his hand upon the King's face and mouth. His Majesty, seeing the deponent, cried, 'Fie! strike him *laigh*, because he has an *pyne doublet†* upon him.' Immediately the deponent cast the hawk off his hand; drew his hanger, and struck Mr. Alexander, and the King instantly pushed Mr. Alexander down stairs. In the rest, he deposed in all points conform to Sir Thomas Erskine.

\* Door of a turnpike stair.

† *Pyne doublet* was an under coat of defence, made of wire, to shield from the point of a dagger. It was worn by *pions*, or foot soldiers.

1600     Robert Christie, porter to the Earl of Gowry, saw my Lord Duke, the Earl of Marr, and the Earl of Gowry, come into the *close*. My Lord Duke asked the deponent, if the King was gone out? He said, Not. Then Lord Marr said, ‘Billy, tell me the verity if his Majesty be furth or not?’ He answered, ‘In truth he is not.’ The Earl of Gowry, looking at him with an angry countenance, said, ‘Thou lie; he is furth at the back gate, and through the Inch.’ Then this deponent answered, ‘That cannot be; for I have the key of the back gate, and all the gates of the place.’ Then the deponent saw his Majesty looking out of the window of a turret, crying, ‘Treason!’ &c. Upon which the Duke, Lord Marr, and others, ran up the turnpike stair to the gallery. After this Lord Gowry came from the High Street into the close, a steel bonnet on his head, a drawn sword in his hand, accompanied by sundry persons, all with drawn swords. My Lord and his followers rushed up the *turnpike* stair; but the deponent knows not what passed within *the place*, save by report; nor knows he any more of the matter.

John Graham of Urquill deposed ‘conform to the Lord Duke of Lennox and Earl of Marr, in all things, *reddens eandem causum scientiae*.’

John Graham of Balgowan deposed in all things conform to the Duke of Lennox.

*Twenty-two more witnesses* depose either in confirmation of the preceding evidence, or to other facts of less moment. In the whole of the depositions, there is not a word of the Earl’s belt and magic characters, nor of his not bleeding till the belt was un-

loosed,\* and of the summons against the Earl of 1600  
Gowry's heirs, and the indictments against his fol-  
lowers who were executed at Perth.

\* In the account that was published soon after the conspiracy, both these facts are mentioned, and probably they were both true. From these, two very different conclusions have been drawn, by the ignorance of those who believed, and the partiality of those who discredited the conspiracy; the one, *that the not bleeding of the wound was owing to the magical characters*; the other, *that this tale is so absurd, as to excite strong suspicion concerning the reality of the conspiracy*. The real matter had been simply this: Lord Gowry received the deep and mortal wound by the thrust of a small sword, and he had not immediately bled externally; but, on his clothes on his belt being taken off, and the body being turned into different postures in the stripping, *the blood had gushed out*. Besides, it frequently happens that, on a person's being blooded after sudden death, no blood will issue for some time; but, when the serous part of the blood separates from the grumous, the former will flow out of the wound. This the fond friend often looks on as the mark of returning life, while it is the most certain indication of death.—Necromancy at this period reigned with uncontrouled sway over the gloomy empire of darkness. A belief in the power of charms, and talismans, has prevailed in a greater or lesser degree in most ages and nations. A judicious sceptic, therefore, will not ground his disbelief of a natural event, because the ignorant witness who testifies it, ascribes it to a preternatural cause. An incident, much more remarkable than Lord Gowry's not bleeding till his belt was unloosed, is authenticated in the trial of Philip Stansfield for parricide, A. D. 1688; a trial which it would be superfluous in me to publish, as a proper abridgement of it has already been made by Salmon. James Muirhead, surgeon, in the course of this trial, deposed, 'That, upon the prisoner's assisting to lift the body of his deceased father Sir James Stansfield, after it had been sewed up, and clean linen put on, it darted out blood through the linen, from the left side of the neck, which the panel touched; but that when he (the witness) and the other surgeon put on the linen, and stirred and moved the head and neck before, he saw no blood at all.' This is confirmed by another

1600 The Parliament pronounced a sentence, declaring the late Earl of Gowry and Mr. Alexander Ruthven, to have committed manifest treason in all points contained in the summons; and, therefore, decerning their name, memory, and dignity, to be extinguished; their arms to be cancelled; their whole estate, real and personal, to be forfeited, and annexed to the crown; their bodies to be taken to the Cross of Edinburgh, and drawn, hanged, and quartered; the name of Ruthven to be abolished; and their posterity, and their surviving brethren, to be incapable of succeeding to, or of holding any offices, honours, or possessions.\*

witness; and it is worthy of remark, that Sir James was not stabbed or shot, but strangled.—*Salmon's State Trials*, p. 610.

\* How different this sentence, how different the execrable law of Arcadius and Honorius, upon which it is founded, from the following law of our brave, our free ancestors, the Goths, whom we, notwithstanding, call Barbarians! ‘*Omnia crimina suos sequantur auctores. Nec pater pro filio, nec filius pro patre, nec uxor pro marito, nec maritus pro uxore, nec frater pro fratre, nec vicinus pro vicino, nec proquinquus pro proquinquo, ullam calamitatem pertimescat. Sed ille solus judicetur culpabilis, qui culpanda commiserit; et crimen cum illo qui fecerit moriatur. Nec successores aut haeredes pro factis parentum ullam calamitatem pertimescant.*’ *Leges Wisigothorum*, Lib. 6. tit. 1. L. 8. The reader may compare the above with a certain other law, which his reflection will suggest to him.—This sentence, in one particular, exceeded the capricious cruelty of the Roman Emperors, viz. in the insult offered to the dead bodies. Sticking the head and limbs of traitors upon poles, or hanging the body in chains, is a refinement of modern tyrants. ‘*Corpora eorum qui capite damnantur, cognatis ipsorum neganda non sunt. Eorum quoque corpora qui exuriendi damnantur, peti possunt: Scilicet ut ossa et cineres collecta sepulturae tradi possint.*’ *Digest. Lib. 48. tit. 24. l. 1.*



The Parliament at the same time pronounced a similar sentence on Alexander and Henry Ruthvens, sons to the Laird of Freeland, Hugh Moncrieffe, brother to the Laird of Moncrieffe, and Patrick Eviot, brother to the Laird of Balhousie. And, on the 22d of August preceding, three of their accomplices, Mr. Thomas Cranston, and George Craigengelt, servants to the Earl of Gowry, and John Macduff,\* who with their drawn swords had rushed up the turnpike with the Earl of Gowry, and assaulted Sir Thomas Erskine, &c. on a proof led, as well as their own confessions, were convicted before the Court of Justiciary at Perth, and executed the same day. 1600

I have thus presented the simple evidence, and without arguments to enlighten, or ingenuity to perplex the case, I apprehend the reader has already formed his opinion, whether this was a *plot of Gowry's against the King, or of the King against Gowry*. I shall now state the following arguments, *which impress me with the most complete conviction, that it was a plot of Gowry against the King*.

*Argument 1st, That an attempt upon the King's person was neither uncommon nor unlikely.* This will be best evinced by a list of the various attempts made by King James's subjects on the person of their Sovereign.

*1st Attempt, 24th May, 1578.* The Earl of Morton, one of the murderers of the King's father, seizes the King and the castle of Stirling.†

\* Lord Gowry had not made these three acquainted with his plot, nor had they any other share in the guilt but joining their master with drawn swords. Records of Justiciary, Aug. 22, 1600.

† Robertson's History of Scotland, vol. II. p. 62. Arnot's History of Edinburgh, p. 34.

1600 *2d Attempt*, 23d August, 1582. William Earl of Gowry, father to the Earl whose trial I present, at his own house of Ruthven, with the aid of other Lords, seizes the King, changes his Ministers, and keeps him in ward about a twelvemonth. This the church voted to be a good and acceptable service to God, the King, and the country.


*3d Attempt.\** Francis Earl of Bothwell, nephew to James Earl of Bothwell, who was one of Darnley's murderers, aided by some Popish Lords, assemble at Quarrel-holes,† with a number of persons, for the purpose of seizing the King in his palace of Holyroodhouse, murdering the Chancellor, and overthrowing the established religion.

*4th Attempt*, 27th December, 1591. The same Earl of Bothwell, James Douglass|| of Spott, and

\* Rec. of Just. 24th May, 1589. Spottiswood's Hist. p. 376. It is worthy of remark, that Logan, in his letter to Lord Gowry, of the 29th July, 1600, on the subject of the intended conspiracy, when speaking of the Earl of Bothwell, uses these words:—'In case God grant us happy success in this errand, I hope to have *both your Lordship, and his Lordship, with many others of your lovers, and his, at a good dinner, before I die.*'

† Close by the village of Restalrig, about a mile distant from Holyroodhouse.

|| Son-in-law to George Home of Spott, who was tried for the murder of Darnley, and who afterwards was one of the jurymen who sat on the trial of Archibald Douglass for the said murder. By the bye, this George Home of Spott was himself murdered, not without great suspicion of the murder being perpetrated by the said James Douglass, his son-in-law and successor. Douglass's inducement to join the conspiracy, was to relieve his servants who were confined within the palace, and who next day were to be put to the torture concerning the murder of his father-in-law. Johnstoni Rer. Brit. Hist. p. 158. Spottiswood's Hist. p. 386. Moyses's Memoirs, p. 180.

about forty accomplices, surprise the palace of Holy- 1600  
roodhouse, while the King and Queen are at supper,   
break open the Chancellor's, and assault the royal  
apartments, kill John Schaw, his Majesty's principal  
equerry, and call for fire to consume such of the  
doors as they could not break up; but are repulsed  
by Sir James Sandilands and the citizens of Edin-  
burgh; and eight of the conspirators hanged next  
morning, without jury, on a gallows erected before  
the palace gate.

5th Attempt, 28th June, 1592. *The same Earl of  
Boothwell, the Master of Gray, and others, who, in  
a few months after, were detected in a fresh conspi-  
racy with the Court of Spain, for invading Scotland  
and England, assault the King in the palace of Falk-  
land at midnight; but, by resistance\* of those with-  
in, and by the country, on the early rumour of dan-  
ger, rising in his Majesty's defence, they are forced  
to abandon the enterprize; they plunder the royal*

\* Great Seal Record, Book 40. No. 21. 15th Aug. 1593.—  
Pardon to the Master of Gray, his uncle, and two brothers, and  
to James Graham, brother to the late Laird of Fintry, for trea-  
sonably attacking the King's person and the palace of Falkland.  
Johnstoni Rer. Brit. Hist. p. 168. Moyse's Memoirs, p. 188.—  
To show how grossly the sacred principle of religion was prosti-  
tuted, how it was a mere mask put on to hide the ambition or  
avarice of those Nobles, whose piety even modern historians have  
not been ashamed to celebrate, it is not incurious to observe, that  
Nobles, of the Popish and Presbyterian religions, frequently united  
in the same conspiracies. \* The wolf and the lamb shall feed to-  
gether.' Isaiah, ch. lxxv. v. 25. The flames of London, in the  
year 1780, gave a fatal and memorable testimony of the delusion  
and outrage, which, under the pretence of religion, may still be  
excited by a champion of the covenant.

1600 stables and park of the horses, and betake themselves to flight. Several of the conspirators are slain in the pursuit, or hanged. *The Master of Gray* is pardoned, that he might have the opportunity of giving additional proofs of his treachery.\*

6th Attempt, 17th December, 1559. The rabble of Edinburgh, instigated by the clergy, and countenanced† by the Lords Lindsay and Forbes, assault with great fury the tolbooth of Edinburgh, in which are the King, his ministers and judges; but are repulsed, or appeased by the magistrates, and more respectable citizens.

7th Attempt, 5th August, 1600, by *John Earl of Gowry*, and *Mr. Alexander Ruthven*, on the person of the King, in the Earl's own house of *St. Johnston*.

\* There were other attempts of less note upon the King's person, which I pass over.

† Arnot's History of Edinburgh, p. 43. Moyse's Memoirs, p. 249.—When Ogilvy the Jesuit was brought to trial, his judges, or rather inquisitors, interrogated him about the Pope's right to depose excommunicated princes, and if it was lawful to put such princes to death. In answering these interrogatories, he reproached the Court with this attempt. After saying it was not Papists but heretics, who inculcated parricide, he goes on thus: ‘Pulveraria conspiratio aulicorum fuit, at non sic cum die Septembris vestra (it should be Decembris) quando ingenti armatorum manu regem in Praetorio cum Senatu necare voluistis, quod et fecissetis nisi concursu opificum satellites adjuti e manibus vestris regem eripuissent. Duo millia sunt hodie Edinburgi qui illo die arma tulerant, et tot esse possunt testes, tres predicantes exhortatos fuisse ad fortiter agendum, clamantes, Deus et ecclesia; cum ex altera parte clamaretur pro Deo et Rege; pro quo facto Edinburgum debebat comburi.’ Relatio incarcerationis et martyrii Joannis Ogilbei, &c. typis viduae, L. Kellami, 1615. See his trial below.

*Argument 2d. That the Earl of Gowry was by no means an unlikely person to make such an attempt.* 1600

Lord Gowry had the misfortune to be born in a country which had been recently stained with a deed of the most diffused and complicated foulness, of any that disgraces the annals of the most corrupt and profligate Court. The Prince under whom he lived, possessed no solid nor permanent authority; nor did his ideas of prerogative correspond with the extent of his power; for he deemed the *Royal pleasure* to be the standard for measuring out law to the subjects. The people, on the other hand, enjoyed no regular system of liberty, yet were extremely destitute of the respect due to the Sovereign. The turbulent nobles, in gratifying their common pursuits, ambition, and revenge, were restrained by no delicacy of sentiment, no politeness of manners. The clergy held the pulpit to be a sanctuary from which they might declaim without challenge on matters of state; and their bold sentiments, their lofty pretensions, were often unfolded in the most coarse and intemperate language. To add to the public disorder, the kingdom was distracted between two foreign factions, and two rival religions. The Spanish faction united with the Popish; the English,\* with

\* It is highly probable that some persons in the Court of England were privy to this conspiracy. In a letter of Logan's, which is ingrossed in the indictment against George Sprott, who was executed for concealing this conspiracy, there is this passage: 'I trust, and am assured, we shall hear word within a few days from them your Lordship knoweth of; for I have a care to see what ships comes home by.' Records of Justiciary, August 12, 1608.

1600 the Presbyterian. The Prince who guided the car of state over those arduous paths, increased the confusion by his inability to direct it. From a want of judgement, of resolution, and of temper, he frequently connived at, or pardoned, the most atrocious crimes, while he punished, with illegal and excessive rigour,\* trivial or imaginary offences. Equally unskilled to hurl the imperial thunder, or to encircle his temples with the rays of mercy, he weakened moral distinction, while he broke down the barriers to the commission of the more atrocious crimes.

The murder of Riccio, by Lord Gowry's grandfather, was perhaps the greatest insult ever offered to a woman and a Sovereign, and may be deemed the harbinger of the succeeding tumults. And the Earl's father, when he seized the King at Ruthven, changed his ministers, and kept him in ward for a twelvemonth, showed that his respect for Princes was not much greater than his father's.

This Earl soon after fell upon the scaffold, and in his death we may probably look for the principal motive to *Gowry's Conspiracy*. The Church, in a solemn act of their Assembly, declared their approbation of the elder Gowry's seizing the King at Ruthven; and the Presbyterian clergy, in their writings and declamations, always enforced this topic, and expressed their opinion, that he fell by an unjust sentence. One of the most eminent and popular of that order was preceptor to Lord Gowry and his brothers. Thus the idea of a murdered father, instilled in the

\* See the Index, articles Tennent, Cornwall, Fleming, Guthrie, Maccalzeane, Ogilvie, Rois, Sandilands.

conversations of their preceptor,\* and supported by the authority of the Church, must have made a deep impression on the youthful minds of the offspring of Gowry. This, indeed, is not simply supported by plausible conjecture; it is instructed by evidence.—When Alexander Ruthven approached the King with a drawn hanger, his words were, ‘*Remember on my father’s death.*’ The same is corroborated by Logan’s letters; letters which, from the proof adduced in the following trial, I hold to be *authentic evidence*; particularly in the following passage:† “I think there is none of a noble heart, or carries a stomach worth a penny, but they would be content and glad to see an contented revenge of *Greysteil’s* death.”‡

The family of Ruthven had long been looked upon as the head of that party which was attached to England and the Reformation; and the accomplishments of the latter Gowry qualified him to be the leader of an enterprising faction. The importance he derived from aristocratic influence over his extensive domains, and from the attachment of a powerful party in Church and State, was embellished with the

\* To exclude misrepresentation, I desire it may be understood, I neither wish to insinuate, nor do I believe, that Lord Gowry’s preceptor, or any of the clergy, instilled into his mind to revenge his father’s death; but only, that they must have repeatedly told him his father fell by a hard sentence; and that his mind brooding over this, joined to his ambition, and the state of the country, probably suggested to him this conspiracy against the King, which terminated in the ruin of himself and of his family. Logan’s Letters, No. 5, would completely vindicate Lord Gowry’s preceptor from such aspersion.

† Logan’s Letters, No. 5. *ult.* July, 1600.

‡ A nickname for the elder Gowry.

1600 lustre of a royal descent.\* Thus ambition, as well  
 ~ as revenge, might stimulate Gowry to his daring

\* William, second Lord Ruthven, the Earl's great grandfather, married Janet Haliburton, eldest daughter, and co-heiress, of Patrick Lord Haliburton of Dirleton, whose predecessor, Sir Walter Haliburton, married Lady Isabel Stuart, eldest daughter of Robert Duke of Albany, Regent of Scotland, third son of King Robert II. The Earl's father, William, first Earl of Gowry, married Dorothea, daughter to Henry Lord Methven, who was first married to the Princess Margaret of England, daughter of Henry VII. and widow of James V. It is said Lord Gowry propagated a rumour of his mother's being descended of that marriage, and that many low people about Perth credited the report. (Scot's Hist. of Scotland, p. 553.) Yet it seems demonstrated that she was sprung of a marriage between Lord Methven and Janet Stewart, daughter of John Earl of Athole. Douglass' Peerage, p. 16, 305, 321. Lord Gowry adopted into the arms of his family, A. D. 1597, a sword pointing towards an imperial crown, with the motto, '*Tibi soli*.' Crawford's Peerage, p. 166.

I am induced to believe that, however atrocious Lord Gowry's purpose might be, he did not intend to dispatch the King immediately. The evidence of what passed between the King and Alexander Ruthven, as well as a consideration of the most wary steps Gowry could pursue, confirm this notion. Ruthven's speech to the King was, '*Sir, You must be my prisoner;*' and, when he returned a second time, and swore there was no remedy, instead of stabbing the King, he only proposed tying his hands. Whether the brothers consulted their ambition or their safety, it was prudent for them not to dispatch the King at St. Johnston. The notorious murderer of the King could have little hope of ascending his throne. By throwing the bloody task upon the hands of an assassin, at an after day, they might shift off the imputation of parricide; and their partizans might deny, with as much effrontery, that Gowry committed the murder, as they have since done that Gowry hatched a conspiracy. Besides, while the King remained in custody of the brothers, his life was a hostage for their safety, and a check upon any spirited measures in the adherents to the



enterprise. Indeed, if his attempt was to be directed <sup>1600</sup> against the life of the King, it could no longer be safe for him to remain in the condition of a subject: and the indecent and malicious imputation of bastardy, with which the fanatics reproached King James, might afford a plausible pretext for secluding the royal offspring.

The family of Hamilton, next heir to the Crown, had long lost its popularity, and the Earl of Arran, its head, had lost his judgement; and, although there undoubtedly were several families interposed between Gowry and the Crown, in the strict line of succession, none of them probably possessed power and popularity to support their right. But, if Gowry and his brother were really endowed with those personal accomplishments which have been so highly extolled, and which made their countrymen conceive ‘*the most sanguine hopes of their early virtues,*’† it is absurd to have supposed Lord Gowry to have flattered himself, that, in a country where *the church was in danger*, where the trumpet of sedition was

royal cause. The house of St. Johnston was but a few yards from the river Tay. Had Lord Gowry been successful in his *actual* attempt to dismiss the King’s followers, by telling them the *willful falsehood* that his Majesty was gone; had the shades of night fallen, he might have conveyed the King down the Tay, with equal ease and secrecy; and his Majesty might either be carried prisoner to England, where his mother had ended her days, or to Logan’s house of Fastcastle, on the coast of Berwick, where Logan boasts that he had ‘*keept my Lord Bothwell in his greatest extremities, say the King and his Council what they would.*’—Logan’s Letters, No. 4.

† Robertson’s Hist. of Scotland, vol. II. p. 252.

1600 sounded by the ministers\* who fortified the ‘chief  
 ~~~~~ ‘block-house of the Lord’s Jerusalem,’ his piety, popularity, and bravery, should supply the defect in title, and make him be called, while there were nearer heirs to the Crown; as has since happened, in the same country, on a similar occasion.

Sundry dark expressions in Logan’s letters, particularly, that the estate of Dirleton† was to be bestowed on him, if Lord Gowry’s scheme should take effect, confirm the notion that his Lordship aimed at the Crown.

Argument 3d, That the circumstances of the 5th August, as established in proof, are consistent ‡ with a

* *Vulgo*—*The Ministers of Edinburgh!* Calderwood’s Hist. of the Church, written by appointment of the General Assembly, p. 447.

† The Gowry family acquired the estate of Dirleton, one of the best in East Lothian, by the marriage of Lord Ruthven with a daughter of Lord Haliburton.

‡ A celebrated historian has endeavoured to invalidate the testimony of Gowry’s conspiracy, recorded before Parliament, by remarking certain discrepancies and contradictions between this testimony and the account of the plot published by the King, recently after the event; and likewise between the evidence given by Henderson before the Privy Council, and that afterwards emitted by him before Parliament. In some of these, he points out discrepancies so trifling, as with me rather tend to strengthen the candour and credibility of the evidence. I present an instance: ‘The King asserts, that Henderson opened the window during Mr. Ruthven’s absence, Disc. 23. Henderson deposes that he ‘was only attempting to open it when Mr. Ruthven returned; and ‘that, during the struggle between the King and him, he opened ‘it.’ Robertson’s Hist. vol. II. p. 270.—Such are the conceptions and faculties of man, that it is *morally impossible* for twenty

plot of Gowry against the King, and incompatible with a design of the King against Gowry. 1600

Of this, I think, any impartial mind may be satisfied, by a bare perusal of the evidence. I shall, therefore, briefly observe, that it is instructed by Alexander Ruthven's coming to Falkland, and taking the King along with him to his brother's house of St. Johnston; by the King's setting out immediately after the chase, without so much as a sword; by the slightness of his Majesty's retinue; by the Duke of Lennox, Lord Gowry's brother-in-law, being of the party; by the suspicions which the King expressed to the Duke, bidding him take heed and follow him; by Alexander Ruthven's separating the King's attendants from him, on the false pretext of his Majesty's commands; by his locking the doors as the King and he went up stairs; thereby secluding all followers; by Lord Gowry's attempting, in the mean time, to get the King's suit sent back to Falkland, for which purpose he asseverated the falsehood, that the King was on horseback and away; and, by the King's being reduced to such distress, as to stretch his neck forth of a window, at the top of the house, his face red, a hand gripping his cheek, and himself crying, 'Treason! Help! I am murdered!'—I shall only add, that, if the King had entertained any

or thirty persons who witness, much more who are concerned in a busy scene of violence and danger, to give a precisely similar account of every minute circumstance; and, were an account tallying so wonderfully to be given in evidence, with me it would destroy the credibility of the whole. The various depositions in the trial of Gowry, in my humble opinion, are very distinct and consistent.

1600 bloody design against Gowry, it was safer, both to his person and government, and more suitable to his timid counsels, to have taken off Gowry by the dagger of a bravo, or by inveigling him into a plot against the state, than by going in person alone, and unarmed, into the secret chambers of the castle of the greatest baron in the kingdom, there to have murdered him, surrounded by his domestics, his friends, and his vassals, and in the center of his extensive domains. And, if the King had, at his devotion, a person so dexterous in the art of forgery, as he must have had, *if Logan's letters are fictitious*, there could be no difficulty in convicting Gowry of any crime his Majesty might think fit to lay to his charge.

Argument 4th, That the letters of Logan of Restalrig, one of the conspirators, afford a separate incontestible evidence of the reality of this conspiracy.

As this argument rests entirely upon the authenticity of Logan's letters, it falls to be discussed in the following trial of Logan himself.

Having stated the evidence, and the argument, which impress me with the most perfect conviction of the reality of this conspiracy, it may not be amiss to enquire how so strange a delusion, as the doubting of this conspiracy, has been propagated and maintained.

In those days, religion was not that gentle and holy affection which strengthens and purifies the

mind, while it humanizes the heart: it was an ethereal fluid which pervaded the whole mass of the constitution, and whose electric shocks served sometimes to purify, and sometimes to consume; and the political atmosphere, strongly impregnated with the flame, often burst forth in thunder. Whatever the clergy were pleased to inculcate was swallowed with the most stupid and greedy faith; and, from the invariable principles of human nature, I may venture to assert they were the less studious of plausibility in their doctrines, in proportion to the simplicity of their flock.

It had pleased the clergy to pass a solemn act of approbation of the elder Gowry's apprehending the King, although it was nothing less than an act of open and manifest rebellion. Is it then wonderful that those who justified the successful rebellion of the father, should deny their belief of the disappointed treason of the son? When the ministers of Edinburgh were desired to assemble the people, to lay before them the particulars of the plot against the King, and to praise God for his delivery, they refused obedience, alledging that they could not deliver from the *chair of truth*,† a relation of facts concerning which they themselves were dubious. And Mr. Robert Bruce, a bold and popular preacher, persisting in his denial, notwithstanding the arguments, the

* To deny the reality of plots, unless the treason was sealed with the blood of the Prince, was no new matter: 'Conditionem Principum miserrimam aiebat (Domitianus) quibus de conjuratione comperta non crederetur, nisi occisis.' Suetonis Delphini, p. 595.

† Calderwood's History, p. 444.

1600 entreaties, and the threatenings of the King, was banished for his disobedience. The spirit of incredulity naturally spread from the pastor through the flock, and it continued to be fostered by the more bigotted of the clergy during the civil wars, which rent the state for a great part of the last century: indeed, with the different factions, a belief or disbelief in Gowry's conspiracy, became a touchstone of party. When the nation was no longer distracted by virulent contention between Church-man and Covenanter, Loyalist and Republican, Whig and Jacobite; when the minds of men were disposed to receive the truth, a circumstance purely accidental has tended to continue this delusion. An eminent historian appeared, whose writings have stamped a deserved impression upon the opinions of the public. Attached to the *order* to which he belongs, it was natural for him to entertain a higher respect for the opinion and authority of those fathers of the church than they deserved, and consequently to imbibe in part their sceptical notions concerning Gowry's conspiracy. These he has delivered with a subtlety of argument, an engaging and persuasive manner,* which capti-

* Human nature is liable to error, from partiality of affection, as well as frailty of judgement; but *candour* is in every man's power. It is therefore my duty to observe, that incontestible evidence is recorded in the books of *Sederunt* of the Court of Session, of the Earl of Gowry, at the time of his death, being creditor to the King in 196,465l. 18s. 6d. of accumulated sum of principal and interest. By the King's inability to pay him, the Earl was so much embarrassed in his circumstances, that the Court of Session granted him for a twelvemonth a personal protection from the diligence of his creditors, just forty-six days before he was killed. And from the common law, as well as the silence

vate the attention, and rivet the wavering opinion, 1600 while perhaps they are unable to convince upon a solid investigation of the judgement.

of the public records, it is probable the Earl's creditors were never paid. I am aware that this fact may make a forcible impression upon those who have been accustomed to doubt of the reality of this conspiracy. But a consideration of the following circumstance will entirely remove every suspicion. Lord Gowry was creditor to the King in this sum, as representing his father, the late Earl, who was Treasurer of Scotland, and that, by accmpt fitted on the 10th of May, 1583, the balance then resting to the Earl being 48,063*l.* which (as Scottish money was greater by the half at that time than it is now) was 72,094*l.* 17*s.* of our present Scottish money of principal, besides seventeen years interest at the then rate of ten per cent. On the 4th of May, 1584, the elder Gowry was convicted, condemned, and beheaded for treason, and his estate forfeited. King James, by a solemn act, restored his son, the latter Gowry, against the forfeiture, and ratified the debt he owed him, which that forfeiture had proscribed, in December, 1585. The personal protection to Gowry was granted on the 20th of June, and his Lordship was killed on the 5th of August, 1600. Can it therefore be alledged that the King made an attempt upon Gowry, with a view of getting quit of this debt, without maintaining that his Majesty restored to the heir, the estate of a person justly condemned, that he might afterwards murder the innocent heir, in order to wrest back the estate he had conferred from his royal clemency? Gowry was restored by two acts of the Parliament, which sat on the 1st, 4th, and 10th December, 1585; the one a general act of indemnity and restoration of *all persons who had been forfeited* since the King's coronation, excepting the murderers of Darnley, and some others. The other was a special statute in favour of the widow and children of William Earl of Gowry. MSS. Acts of *Sederunt*, vol. IV. 20th June, 1600; Records of Parliament, 1st, 4th, 10th December, 1585; Spottiswood's Hist. p. 331. See the Act of *Sederunt* which I have printed in Appendix, No. I.

Robert Logan of Restalrig, for Accession to Gowry's Conspiracy.

1600 **I**N the year 1608, George Home, Earl of Dunbar, was informed by a gentleman of his acquaintance, that there was one Sprott, a notary at Eyemouth, who had communicated to him some particulars relative to Gowry's conspiracy, which this Sprott had kept secret till the persons concerned in it were dead.* The Earl acquainted the Lord Advocate, and Sprott was instantly apprehended. He was examined before the Privy Council on the 5th of July, 1608, and afterwards underwent frequent examinations. His voluntary confession was made the subject of an indictment against him before the Court of Justiciary, as being in the treasonable foreknowledge of Gowry's conspiracy. He was tried capitally on the 12th of August, 1608, *upon his own confession alone*. He was convicted. He was condemned to be hanged that very day at the cross of Edinburgh, and his head to be put up on the tolbooth, beside the traitor Gowry's. He confessed he perfectly knew that Logan of Restalrig was in the foreknowledge of Gowry's conspiracy: that letters passed between the Earl and Restalrig on the subject, in the beginning of July, 1600; that a servant of Restalrig's, commonly called *Laird Bour*, was the messenger employed in these dispatch-

* Logan of Restalrig, and his servant, Laird Bour, died about the year 1606.

es, had some of them in his keeping, and showed 1600 them to the prisoner in the house of Fastcastle, among other papers, he, Bour, being unable to read, and that he took the opportunity to secret them.* He confessed that he was often in company with Restalrig, as well as with Laird Bour, heard the conference which passed between them relative to a letter which Bour had brought back to his master from Lord Gowry: that he afterwards enquired of Bour what was going on between his master and the Earl of Gowry? to which Bour answered, 'He believed that the Laird should get Dirleton without either gold or silver, but feared that it should be as dear unto him;' and Sprott enquiring how that could be? Bour said, 'they had another pye in hand nor the selling of any land; but prayed Sprott, for God's sake, he would let be, and not trouble himself about the Laird's business; for he feared, within few days, the Laird would be either landless or lifeless.' By this declaration he uniformly abode. He adhered to it on the scaffold, when he was performing the last solemn duties of penitence and prayer; and he declared that he should give the people a signal of its truth after he was thrown over the ladder; accordingly, to the astonishment of the spec-

* The summons of forfaiture against Logan's heirs, explains more particularly how Sprott came by these letters: that Laird Bour, when he got them back from the Earl of Gowry to be returned to Restalrig, detained the letters; that Sprott stole them from him, and Restalrig becoming apprehensive that Sprott or Bour would betray him, bribed them both with many presents, to keep the secret. See an excerpt from this summons in Appendix, No. 2.

1600 tators, he clapped his hands thrice when he was suspended on the gallows. All this is testified in the Records of Parliament under the subscription of the Lords of the Privy Council, the Archbishop of Glasgow, many noblemen, and the magistrates and ministers of Edinburgh, who were upon the scaffold during the time of his execution.

The *queue* being thus given to Restalrig's guilt, a summons of treason was executed against Robert Logan, his eldest son and heir, and all others concerned, on the 15th of February, 1609, to appear before the King and estates of Parliament, on the 12th of April, and defend themselves from the charge of high treason exhibited against the late Logan of Restalrig.

The cause was brought before Parliament on the 24th of June, and his Majesty's Advocate, for proving of the charge, produced George Spratt's declarations,* and confessions before the Privy Council, the Court of Justiciary, and on the scaffold. His Lordship also produced the depositions of witnesses examined before the Privy Council, and the Lords of Articles; and the following letters of the deceased Logan of Restalrig.

LETTER I.

Right Honourable Sir, my duty, with service remembered.—Please you understand, my Lord of Gowrie, and some others his Lordship's friends and well-wishers, who tenders his Lordship's preferment,

* Register of Parliament, 24th June, 1609.

are upon the resolution, you know, for the revenge ¹⁶⁰⁰ of that cause: and his Lordship has written to me anent that purpose; whereto I will accord, in case ye will stand to, and bear a part; and before ye resolve, meet me and Mr. *Alexander Ruthven*, in the *Canon-gate*, on *Thursday* the next week; and be as wary as you can. Indeed, Mr. *Alexander Ruthven* spoke with me four or five days since, and I have promised his Lordship an answer within ten days at farthest. As for the purpose, how Mr. *Alexander Ruthven* and I has set down the course, it will be a very easy done turn; and not far by that form with the like stratum whereof we had conference in T. S. But in case you and Mr. *Alexander Ruthven* forgather; because he is somewhat uncautious, for God's sake beware with his racklessness as to this of *Padua*; for he told me one of the strangest tales of a Nobleman of *Padua** that I ever heard in my life, resembling the like purpose. I pray you, Sir, think nothing, although this bearer understand of it; for he is the special secretary of my life; his name is *Laird Bour*, and was old *Manderston's* man for dead and life; and even so now for me. And for my own part, he shall know of all that I do in this world, so long as ever we live together; for I make him my household man: he is well worthy of credit, and recommend him to you. Always to the purpose, I think best, for our plot, that we meet all at my house of *Fastcastle*: for I have concluded with Mr. *Alexander*, who, I think,

* What this story is of a Nobleman of Padua, a learned antiquarian of Italy may possibly be able to unfold. I despair of ever hearing it. Lord Gowry and his brother, as they travelled for their accomplishment, passed a considerable time at Padua.

1600 shall be meetest to be conveyed quietly in a boat by
~ sea; at which time, upon sure advertisement, I shall
have the place very quiet and well provided; and, as
I receive your answer, I will post this bearer to my
Lord: and I pray you, as you love your own life,
(because it is not a matter of mowse,) be circumspect
in all things, and take no fear but all shall be well.
I have no will that either my brother, or yet M. N. R.
my Lord's old pedagogue, know any thing of the
matter, till all be done that we would have done;
and then I care not who gets wit that loves us.
When ye have read, send this my letter back again
with the bearer, that I may see it burn't myself; for
so is the fashion in such errands: and, if you please,
write your answer on the back hereof, in case ye will
take my word for the credit of the bearer, and use
all expedition; for the turn would not be long de-
layed. Ye know the King's hunting will be shortly;
and then shall be best time, as Mr. *Alexander* has as-
sured me, that my Lord has resolved to enterprize
that matter. Looking for your answer, commits
you to Christ's holy protection. From Fastcastle,
the 18th day of July, 1600.

Your's to utter power ready,

RESTALRIG.

LETTER II.

Laird *Bour*, I pray you haste you west to me about
the errand I told you; and we shall confer at length
of all things. I have received a new letter from my
Lord of *Gowrie*, concerning the purpose that Mr.
Alexander, his Lordship's brother, spoke to me be-

fore; and I perceive that I may have advantage of 1600 *Dirleton*, in case his other matter take effect; as we hope it shall. Always, I beseech you, be at me, the morn at even; for I assured his Lordship's servant, that I shall send you over the water within three days, with a full resolution of all my will, anent all purposes, and I shall indeed recommend you and your trustiness to his Lordship, as ye shall find an honest recompence for your pains in the end. I care not for all the land I have in this kingdom, in case I can grip off *Dirleton*; for I esteem it the pleasantest dwelling in Scotland. For God's cause keep all things secret, that my Lord, my brother, get no knowledge of our purposes; for I rather be carded quick*. And so looking for you, I rest till meeting. From the *Canongate* the 18th day of July.

P. S. I am very ill at ease, therefore speed you hither.

Your's to power ready.

RESTALRIG.

LETTER III.

Right Honourable Sir, all my hearty with humble service remembered, since I have taken on hand to interprise with my Lord of *Gowrie*, your special and only best beloved; as we have set down the platt already, I will request you that you will be very circumspect and wise, that no man get an advantage of us. I doubt not but you know the peril to be both

* Buried alive.

1600 life, lands, and honour, in case the matter be not wisely used; and, for my own part, I shall have a special respect to my promise that I have made to his Lordship and Mr. *Alexander*, his Lordship's brother, although the scaffold were set up. If I cannot come to Falkland the first night, I shall be timely in St. *Johnston* on the morn. Indeed, I lippeden† for my Lord himself, or else Mr. *Alexander*, his Lordship's brother, at my house of *Fastcastle*, as I wrote to them both. Always I repose on your advertisement of the precise day, with credit to the bearer; for howbeit he be but ane sillie glyed old carle, I will answer for him, that he shall be very true. I pray you, Sir, read, and either burn or send again with the bearer; for I dare hazard my life, and all I have else in the world, on his message, I have such proof of his constant truth. So commits you to Christ's holy protection.

From the *Canongate* the 27th day of July, 1600.

P. S. I used not to write on the back of any of my letters, concerning this errand.

Your's to all power, with humble service ready,
RESTALRIG.

LETTER IV.

My Lord, my most humble duty, with service, in most hearty manner remembered. At the receipt of your Lordship's letter, I am so comforted, especially at your Lordship's purpose communicated to me

† I trusted to, I expected the coming of.

therein, that I can neither utter my joy, nor find 1600
myself able how to encounter your Lordship with
due thanks. Indeed, my Lord, at my being last in
the town, Mr. *Alexander*, your Lordship's brother,
imparted somewhat of your Lordship's intention
anent that matter unto me: and, if I had not been
busied about some turns of my own, I thought to
have come over to *St. Johnston* and spoken with your
Lordship. Yet always, my Lord, I beseech your
Lordship, both for the sake of your honour, credit,
and, more than that, that your life, my life, and
lives of many others, who may, perhaps, innocently
smart for that turn afterwards, in case it be relieved
by any, and likewise the utter wrecking of our
lands and houses, and extirpating of our name, look
that we be all as sure as your Lordship, and I my-
self shall be for my own part; and then I doubt not
but, with God's grace, we shall bring our matter to
an fine*, *which shall bring the contentment to us all
that ever wished for the revenge of Machivellian mas-
sacring of our dearest friends.* I doubt not but Mr.
Alexander, your Lordship's brother, has informed
your Lordship what course I laid down to bring all
your co-associates to my house of *Fastcastle* by sea,
where I should have all materials in readiness for
their safe receiving on land, and into my house,
making, as it were, but a manner of passing time
in an boat on the sea in this fair summer-tide,
and no other strangers to haunt my house while we
had concluded on the laying our plot, which is al-
ready devised by Mr. *Alexander* and me. And I

* To a conclusion.

1600 would wish that your Lordship would either come,
 or send Mr. *Alexander* to me, and thereafter I would
 meet your Lordship in *Leith*, or quietly at *Restabrig*,
 where we should have prepared an fine hatted kit*,
 with sugar and comfeits and wine, and thereafter
 confer on matters; and the sooner we brought our
 purpose to pass it were the better, before harvest.
 Let not Mr. *W. R.* your old pedagogue, ken of your
 coming. But rather would I, if I durst be so bold
 to intreat your Lordship once to come and see my
 own house, where I have kept my Lord *Bothwell*
 in his greatest extremities, say the King and his
 Council what they would. And in case God grant
 us happy success in this errand, I hope both to have
 your Lordship and his Lordship, with many others
 of your lovers and his, at a good dinner before I die.
 Allways I hope that the King's buck-hunting at
Falkland this year shall prepare some dainty cheer
 for us, against that dinner, the next year, *jocose hoc*,
 to animate your Lordship at this time: but, after-
 wards, we will have better occasion to make merry.
*I protest, my Lord, before God, I wish nothing with
 a better heart nor to atchieve to that which your Lord-
 ship would fain attain unto; and my continual prayer
 shall tend to that effect; and with the large spending
 of my lands, goods, yea, the hazarding of my life,
 shall not afay me from that, although the scaffold
 were already set up, before I should falsify my pro-*

* A hatted kit is a dish common in Scotland at this hour. It is a preparation of milk kept for some time. The whey is let off, and the remainder is of a pretty thick consistence, and no unpleasant acidity.

mise to your Lordship, and persuaide your Lordship 1600
thereof. I trow your Lordship has an proof of my
constancy already or now. But, my Lord, whereas
your Lordship desires, in your letter, that I crave
my Lord, my brother's mind anent this matter. I
utterly disassent from that, that he ever should
be an counsellor thereto; for, in good faith, he
will never help his friend nor hurt his foe. Your
Lordship may confide more in this old man, the
bearer hereof, my man, Laird *Bour*, than in my
brother; for I lippen my life, and all that I have else,
in his hands; and I trow he would not spare to ride
to hell's gate to please me; and he is not beguiled of
my part to him. Always, my Lord, when your
Lordship has read my letter, deliver it to the bearer
again, that I may see it burnt with my own eyes; as
I have sent your Lordship's letter to your Lordship
again; for so it is the fashion I grant. And I pray
your Lordship to rest fully persuaded of me, and all
that I have promised; for I am resolved, howbeit it
were to die the morn. I must entreat your Lord-
ship to exped *Bour*, and give him strait directions,
upon pain of his life, that he take never a wink of
sleep until he see me again, or else he will utterly
undo us. I have already sent another letter to the
gentleman your Lordship knows, as the bearer will
show your Lordship of his answer, and forwardness
with your Lordship; and I shall show your Lordship
farther at meeting, when and where your Lordship
shall think it meetest. Till which time, and ever, I
commit your Lordship to the protection of Almighty
God.

From *Gunn's Green*, the 29th day of July, 1600.

1600 P. S. Prays your Lordship hold me excused for my unseemly letter, which is not so well written as minister were; for I durst not let any writers ken of it, but took two sundry idle days to do it myself. I will never forget the good sport that Mr. *Alexander*, your Lordship's brother, told me of a nobleman of *Padua*. It comes so oft to my memory; and, indeed, it is aparastur* to this purpose we have in hand.

Your Lordship's own sworn and bunden man,
to obey and serve with effold and ever ready
service, to his utter power, to his life's end,

RESTALRIG.

LETTER V.

Right Honourable, my hearty duty remembered, ye know I told you at our last meeting in the *Canon-gate*, that Mr. *Alexander*, my Lord of *Gowrie*'s brother, had spoken with me anent the matter of our conclusion; and, for my own part, I shall not be hindmost. And, sinsyne, I got a letter from his Lordship's self for that same purpose; and, upon the receipt thereof, understanding his Lordship's frankness and forwardness in it, God knows if my heart was not lifted ten stages. I posted this same bearer to your Lordship, to whom you may concredit all your heart in that as well as I: for, and it were my very soul, I durst make him messenger thereof, I have such experience of his truth in many other things. He is a silly old glied carle, but wonder honest; and, as he has reported to me his Lordship's

* Apropos.

own answer, I think all matters shall be concluded 1600
 at my house of *Fastcastle*; for I and Mr. *Alexander Ruthven* concluded, that ye should come with him
 and his Lordship, and only another man with you,
 being but only four in company, intill one of the
 great fishing-boats; be sea, to my house, where ye
 shall land als safely as on *Leith* shore, and the house,
 against your Lordship's coming, to be quiet; and,
 when you are about half a mile from shore, as it were
 passing by the house, to gar set forth a waff*. But,
 for God's sake, let neither any knowledge come to
 my Lord, my brother's ears, nor yet to Mr. *W. R.*
 my Lord's old pedagogue; for my brother is kittlet
 to shoe behind, and dare not enterprise for fear; and
 the other will dissuade us from our purpose with
 reasons of religion, which I can never abide. I think
 there is none of a noble heart, or carries a stomach
 worth a penny, but they would be content, and glad
 to see an contented revenge of *Greysteil's* death; and
 the sooner; the better his Lordship be quick; and bid
 Mr. *Alexander* remember on the sport he told me of
Padua; for I think with myself that the cogitation on
 that should stimulate your Lordship. And, for God's
 cause, use all your courses *cum discretione*. Fail not,
 Sir, to send back again this letter, for Mr. *Alexander*
 learned me that fashion, that I may see it destroyed
 myself. So, till your coming, ever commits you
 heartily to Christ's holy protection.†

From *Gunn's Green*, the last day of July, 1600.

* Cause hang out a flag.

† Ticklish.

‡ The subscription is torn away from the last letter.

1600 If these letters are genuine, the controversy respecting Gowry's conspiracy is ended. I shall now state the proof of their authenticity. On the substance of these letters, or what is called *the internal evidence*, I shall make few remarks.

There are certain passages in these letters which express such a strength, and originality of feature, as indicate the author to have been a character strongly marked; and give reason to believe that the person who composed them was not writing under a fictitious signature. In one of them Logan observes, 'your Lordship desires in your letter that I crave my Lord, my brother's mind, anent this matter; I utterly disassent from that, that he should ever be an counsellor thereto, *for in good faith he will never help his friend, nor hurt his foe.*' In another, he adds, 'for God's sake let neither any knowledge come to my Lord, my brother's ears, nor yet to Mr. W. R. my Lord's old Pedagogue; for my brother is kittle* to shoe behind, and dare not enterprise for fear; the other will dissuade us from our purpose, with reasons of religion which I can never abide.' The following passage in letter 1st, in my opinion, confirms its originality: 'When ye have read, send this back again with the bearer, that I may see it burn't myself.' This precaution, which it was extremely natural for a person to suggest, who was writing on so dangerous a subject, yet which might in the issue be neglected, would have been the most absurd paragraph that could be invented by one

* Ticklish, in allusion to a horse that kicks and winces while he is shod.

who was fabricating letters applicable to a period 1600 long previous to that on which they were to be produced.

To come, then, to the extrinsic or positive evidence of these letters, it must be remembered, that a testimony of a very singular nature and force has already been produced, and that *Sprott who gave it sealed it with his blood*. The following proof is also given of the authenticity of these letters: Mr. Alexander Watson, minister of Coldingham, deposed, That on his conscience, he believed the five letters produced, to be written by the late Robert Logan of Restalrig, with his own hand, not only because the character resembled perfectly his hand-write every way, but also agreed with the fashion of spelling, which the deponent remembered in sundry specialities which he stated in his evidence. And, in confirmation of this, he produced three letters holograph of Restalrig, to show their conformity with the letters produced.

Mr. Alexander Smith, minister of Chirnside, deposed, That he was well acquainted with the late Logan of Restalrig, and also with his hand-write, having been preceptor to his children for many years. He swore that he firmly believed these five letters, and every word of them, to be the proper hand-write of the Laird of Restalrig, both on account of the resemblance of character, and of the peculiarity of Restalrig's spelling, which was different from the mode commonly used, in many particulars, as specified at length by the preceding witness.

1600 Sir John Arnot,* Provost of Edinburgh, deposed, that he was well acquainted with Restalrig's hand of write, having seen many of his writings, and received various letters from him. He deposed, that, having considered the five letters produced by the Lord Advocate, he, on his conscience, believed the whole of them to be written by Restalrig, because the character agreed every way with the shape of Restalrig's hand-write, and also the spelling in many particulars, in which Restalrig differed from other men's form of writing. And, in confirmation of this, he produced four deeds, all of the proper hand-writing of Restalrig, agreeing perfectly in spelling and character with the missives produced.

The Sheriff-clerk of Berwickshire, the Minister at Aytoun, and two other witnesses, confirm the preceding evidence.

A sentence similar to that passed upon Gowry was pronounced upon Restalrig; a sentence, in *one* respect, as illegal as it was severe; for the treason laws only admitted of trial after death against the heirs of such persons as were known in their lifetime to have committed treason, as Dr. Robertson excellently argues.† The statute, however, was *not violated in any other particular*, for the summons against Restalrig's heirs was executed *within three years* after

* Sir John Arnot was appointed treasurer-depute of Scotland about the year 1604. The General Register still shows the great estate he possessed in the counties of Edinburgh, Fife, Berwick, and Orkney.

† Robertson's Hist. of Scotland, vol. II. p. 260.

his death. Such, however, was then the state of the 1600 country, that, in a capital trial, no man could build his security on the precepts of law, the principles of justice, and the feelings of humanity.

I dismiss this investigation with submitting the following proposition: ‘ Whether, if the evidence I ‘ have presented of the state of parties in Scotland, ‘ and of their outrageous attempts; of what passed ‘ before such a multitude of witnesses at St. Johnston ‘ on the important day; of Sprott’s foreknowledge of ‘ the conspiracy, which he testified and *sealed with* ‘ *his blood*; and of the authenticity of Logan’s letters; ‘ I say, if these united testimonies collected into one ‘ focus do not ascertain the reality of Gowry’s conspiracy, I submit, whether there be such a thing as ‘ historical or legal evidence.’

*Francis Tennent, Merchant-Burgess of Edinburgh,
for Writing a Seditious Pasquinade against the
King.*

THE prisoner was indicted at the instance of Thomas Hamilton,* his Majesty’s Advocate, for writing and dispersing slanderous letters, reproachful of the King, his progenitors, and council.

No counsel appeared for the prisoner; but he gave

* Afterwards Earl of Haddington, and Secretary of State.

1600 in defences in writing,† which must have been done by a lawyer. His defences were:—That he was not apprehended nor prosecuted on account of a recent crime, but for a fact alledged to have been committed three years before: that he was not allowed the legal *induciae*, or warning of fifteen days, provided by statute for prisoners to prepare their defences: that no copy of the indictment was given him; but that he was *summarily presented in pannell without any citation preceding*: that ‘*speaking generally, without cursing, is no lawful cause for taking a man’s life,*’ according to the liberal and humane rescript of the Roman Emperors, *Si quis Imperatori maledixerit*.‡ ‘*Quoniam si id ex levitate processerit, contemnendum est: Si ex insania, miseratione dignissimum: Si ab injuria, remittendum.*’

The Lord Advocate answered, That the prisoner’s pleas of the distance of time at which the offence was committed, of his being furnished with no copy of the indictment, and being denied the usual time for preparing his defences, ought to be repelled, because the crime libelled was *sedition against the Prince*: that the defence which he founded on the Imperial Code ought also to be repelled by reason of the statute of James VI. parl. 14. c. 205. A statute, in which it must be confessed, that King James exceeded the tyranny of his predecessors, as it extended the pain of death to those who even read, or heard, any slanderous writings or speeches against the King, without lodging informations against the offenders.

† Records of Justiciary, October 8, 1600.

‡ Codicis lib. 9. tit. 7. l. unie.

The Court repelled the prisoner's defences, and found 1600 the libel relevant. ~~~~~

The Lord Advocate produced before the Court, and the Jury, which consisted of merchants and tradesmen of Edinburgh, two letters. These the prisoner acknowledged to be of his hand-writing; and the Jury, in respect of the act of Parliament cited above, and of the letters produced, unanimously found the prisoner guilty.

It may, perhaps, appear surprising that the prisoner should have confessed; but, I apprehend it was both the most natural and most prudent conduct he could pursue: for it is probable the letters could have been proved against him; and he was threatened with the torture in the course of the process.

A royal warrant, dated at Linlithgow, Sept. 23, was then produced, ordaining the Court to pronounce the following sentence: That the prisoner be taken to the cross of Edinburgh, and his tongue cut out at the root; that a paper be fixed on his brow, denoting him to be the author of *wild and seditious pasquils*,* and that he then be taken to a gallows, and hanged till he be dead. But, as the King affected the vain boast of clemency, a second royal warrant was produced, in which the torturing and cutting out the tongue were dispensed with; and his Majesty was *graciously pleased* to declare, he was content that the prisoner should—*only be hanged*: a sentence which was accordingly pronounced.

Immediately upon the prisoner's being sentenced, the Lord Advocate took away the letters upon which he was convicted, declaring, that he would not have them entered upon the record.

* Pasquinades.

Archibald Cornwall, Town-Officer in Edinburgh, for attempting to hang up the King's Picture on the Gallows.

1600 AS this trial is nonpareil, I present it neat. ‘Archibald Cornwall, town-officer, *dilaied** of the ignominiously dishonouring and defaming of his Majesty, in taking off his portrait, and laying of the same, and setting thereof to the stoops and up-bearers of the gibbet, pressing to fix up the same thereupon.’

‘Pursuer, Mr. Thomas Hamilton,† advocate to our Sovereign Lord.’

Then follow the names of the assize; they are mostly tailors; two of them are designed *fruitmen*.

‘The assize, by plurality of voices, choose John Ranken, (tailor, burgess of Edinburgh,) chancellor.

‘The assize, *for the most part, file and convict* Archibald Cornwall, officer, of the *treasonable* setting of his Majesty’s portrait to the stoops of the gibbet, and putting of the same to be hung forth upon an nail infixt in the said gibbet.

‘The justice-depute, by the mouth of Robert Galbraith, dempster‡ of the said Court, decerned and ordained the said Archibald Cornwall to forfeit life, lands, and goods, and to be taken to the said gibbet, whereupon he *pressed* to hang his Majesty’s

* *i. e.* accused. † Records of Just. 25th April, 1601.

‡ Executioner, from the word doom; or perhaps from the Latin verb *demo*, *dempti*.

‘ portrait, and there to be hanged *quhill** he be dead, 1600
 ‘ and to hang thereupon by the space of twenty-four ~~~~~
 ‘ hours, with an paper on his forehead, containing
 ‘ that vile crime committed by him, which was pro-
 ‘ nounced for doom!’—A man hanged for attempt-
 ing to fix up a paultry daubing, or a halfpenny print
 upon the gallows, or even a halfpenny itself; for it
 also bears ‘ the image and superscription of Cesar.’
Dii boni!

But this, bad as it is, is not the worst point of
 light in which this trial must be viewed. For to
 hang a man on account of transgressing a law, an-
 nexing a capital punishment to the knotting of straws,
 is not so repugnant to liberty and justice, as the hang-
 ing him upon no law at all, but merely at the caprice
 of a tyrant. Now, there is nothing in the Scottish
 statutes upon which this indictment could have been
 founded. The idea, indeed, must have been bor-
 rowed from the Roman law; yet, even upon the Im-
 perial edicts, this man could not have been legally
 convicted: for there is hardly an analogy between
 the images of the Roman Emperors and a modern
 picture; Emperors, who themselves were deified, and
 whose consecrated statues were the objects of reli-
 gious adoration. Nay, were the analogy complete
 between the Imperial images, and the pictures of a
 modern prince; and, were the sanguinary edicts that
 guarded the majesty of Rome, suitable to a limited
 monarchy, still the prisoner must, by law, have been
 acquitted; for ‘ Non videri contra majestatem fieri
 ‘ ob imagines† Cesaris *nondum consecratas venditas.*’

* until.

† Digest. Lib. 48. Tit. 4. Lex 5. § 2.

Doom pronounced over the Dead Body of Francis Mowbray, a prisoner, who was killed in his attempt to escape from Edinburgh Castle.

1603 **A** Royal warrant was directed to Sir William Hart, and the other Judges of the Court of Justiciary, setting forth, in the usual bombast stile of treasonable indictments, that the deceased had been guilty of *most high, horrible, and detestable points of treason*;^{*} that the same was verified by *two or three* witnesses; but that the deceased obstinately persisted to deny the charge: that he attempted to make his escape from Edinburgh Castle, which rendered his guilt the more manifest; and that, in the attempt, he had brought about his own miserable and shameful death. The warrant, therefore, required the Court to pronounce sentence on the deceased ‘Francis Mowbray, *now presented on pannel,*’ (*i. e.* produced at the bar,) to be dismembered as a traitor; his body to be hanged on a gibbet, and afterwards quartered; his head and limbs stuck on conspicuous places in the city of Edinburgh; and his whole estate to be forfeited. The warrant is dated at Holyroodhouse. 31st January, 1603, and is subscribed James Rex, Montrose Cancellor, Marr, Herreis, Halyrudhouse. Doom was pronounced accordingly.

This, perhaps, exceeds every act of King James’s tyranny. For, 1st, this sentence of forfeiture, pro-

^{*} Rec. of Just. ult. Jan. 1603.

nounced after death, was not adjudged by Parliament, but by the Court of Justiciary, in consequence of a royal edict. 2d, No summons of treason was executed against the heirs of the deceased, nor any defender cited, unless the corpse, which was produced at the bar, can be called a defender. 3d, No specific charge was exhibited against the deceased; nor any thing but a general accusation of treason and *laese-Majesty*, which, in those days, was so far from conveying any precise and definite idea, that it might have been any thing which occurred to the whim of the King's Advocate, or that of his Royal Master. 4th, No proof was adduced in Court, no jury called, nor verdict returned, establishing the charge upon which the sentence of forfeiture was pronounced.

Nothing can impress us with a worse opinion of those times, than to behold the people stupid, yet whimsical, abject, yet insolent. When aroused by the clergy, on the score of speculative doctrines, or even forms of religion, they would break forth into the wildest outrages against their governors; yet they would remain supinely indifferent to the wanton invasion of the most established principles of law, and of the most sacred rights of mankind.

Trial of Mr. Andrew Crichton, for Declining the Authority of the King and Privy Council.

1610 THE prisoner, who was brother to the Laird of Innernytie, was prosecuted at the instance of Sir Thomas Hamilton, his Majesty's Advocate, for *treasonably** declining the jurisdiction of the King and Privy Council. The indictment set forth, that the prisoner being brought before the Privy Council, 'to be examined upon such matters concerning his Majesty and the estates of this his kingdom, and required by their Lordships to give your oath to them, that you should faithfully and truly answer to them, and declare the verity of such things as should be demanded of you: Ye treasonably refused to acknowledge his Majesty, and the said Lords of his most honourable Privy Council, to be your judges; but most treasonably declined their judgement.'

The act of Parliament, A. D. 1584, c. 129. confirming the authority of the King and Privy Council, in all cases, and over all persons, and annexing the pain of treason to the denial of the same, was then read over to the prisoner: but he persisted in declining the jurisdiction of the King and Privy Council, and judicially ratified his *declinature*.

The Court sentenced him to be taken to the Cross of Edinburgh, and to be hanged, his body to be dismembered as a traitor, and his whole estate to be

* Rec. of Just. 29th August, 1610.

forfeited. But, after remaining six months in pri- 1610
son, under sentence of death,* the King was pleased
to change the sentence to perpetual banishment.

In reading the judicial proceeding of those wretched times, our surprise is divided between the mulish conceit of individuals in declining the royal authority, and the tyranny of government in the exercise of that authority. This mode of calling people before the Privy Council, and requiring them to make oath that they should answer every question which might be put to them, is as high a stretch of tyranny, as any tribunal on earth, I presume, ever attained. That no rude breath might pollute the Majesty of the Throne, a capital punishment had been annexed, even to the hearing of slanderous speeches against the King, without informing upon the authors; and the unsocial spirit† of the reformed religion had guarded its *monopoly of the mind*; by annexing the like penalty to those who gave food or lodging to a Popish priest. To call then people before the Council, and oblige them to give an oath that they should answer every question which might be put to them, was laying them under the necessity of becoming public informers, in a case where the pain of death was annexed to the exercise of an act perhaps of hospitality or charity.

* Records of Just. 27th February, 1611.

† It is strange that *the true religion*, which is the only direct road to salvation, will not content itself with the endless spiritual consequences it presents to mankind, but that it will also deal out fire and faggot, to those who are so far mistaken, as to pursue their course to heaven by any other road.

1615 I presume it must have been some motive of religion which induced the prisoner, Crichton, to decline the authority of the King and Privy Council. So nearly do extremes meet, that Black, the Presbyterian minister at St. Andrews, declined their authority in the year 1596, when cited before the Privy Council to answer for an offence which he had committed;* and Ogilvie, the Jesuit, declined the same jurisdiction, A. D. 1615, when required to answer every interrogatory that might be put to him. Black received a censure, but Ogilvie was hanged.

John Fleming, for Slandorous Speeches against the King.

THE prisoner was pursued at the instance of Sir William Oliphant of Newtown, King's Advocate, on account of 'treasonable, blasphemous, and damnable speeches, uttered by him to John Lauder, minister at Cocksburnspath.' The prisoner most humbly threw himself in his Majesty's will, *i. e.* submitted to his Majesty's pleasure.†

The indictment set forth, that this Lauder, the minister, 'having reprehended and found fault with the said John Fleming, because his son repaired not to the communion; saying to the said John, that *albeit* (although) he contemned the order and dis-

* Spottiswood's Hist. p. 419. See the trial of Ogilvie *infra*.

† Records of Justiciary, May 17, 1615.

'cipline of the kirk, yet the King's most gracious 1615
 ' Majesty, who is a most religious and godly Prince, ~~~~~
 ' and *under whose blessed government the true religion*
 ' and discipline of the kirk is established, and ad-
 ' vanced, would not suffer such contempt and dis-
 ' obedience to pass unpunished! The said John Flem-
 ' ing, upon deliverance of the said speeches, shaking
 ' off all fear of God, and that reverend respect which
 ' in conscience before God, and in his duty and al-
 ' legiance he owed to his Majesty, most treasonably,
 ' blasphemously, and *mischantlie**, replied to the said
 ' minister in these words: Feind† nor the King shoot
 ' to dead or the morn, and that he die of the falling
 ' sickness. And it being demanded of the said John
 ' what moved him to utter such blasphemous and
 ' horrible speeches against his Majesty? made this
 ' scornful and disdainful answer, Were not the
 ' King and his laws,† he had not wanted his lands;
 ' and therefore he cared not for the King, *for hang-*
 ' *ing would be the worst of it.*'

The prisoner was not far mistaken in his predic-
 tion. He was sentenced to be hanged at the cross of
 Edinburgh, and his moveable goods to be forfeited.

* From an obsolete French word, *meschantment*, wickedly, ma-
 liciously.

† An oath, a mode of swearing.

‡ The cause of offence which this poor man had received was
 the loss of a law-suit.

Thomas Rois, son of the late John Rois of Craigie, for writing and publishing at Oxford, a Pasquinade against the Scots.*

1618 THE prisoner was prosecuted before Mr. Alexander Colville, Justice-depute, at the instance of Sir William Oliphant of Newton, his Majesty's Advocate, who produced in Court an act of Privy Council, authorising the prosecution.

The prisoner was charged in the indictment with 'the devilish and detestable firing, feigning, blasphemous uttering, and by writ publicly exposing, of an villainous,† infamous, and devilish writ,' &c. In this pasquinade, which was in the form of a thesis, the prisoner had maintained, that all Scotsmen, except the King, his sons, and a very few others, ought to be debarred from the Court of England. He expressed his surprise, that the English, who in other respects were quick enough sighted, should suffer such an unprofitable and pernicious multitude, the very offscourings of the people, to domineer within their territories. He laid down his thesis in ten propositions, or articles, composed in Latin, and written with his own hand. He affixed it to the door of St. Mary's church in Oxford, and publicly

* I know not if the family of *Rois*, or *Ross*, of Craigie, be still extant; but their armorial bearings are described by Sir James Balfour, Lyon King at Arms in the reign of Charles I.; Nisbet's Heraldry, vol. I. p. 416.

† Records of Justiciary, August 20, September 10, 1618.

offered to defend his thesis, at the universities of Paris, Cambridge, or Oxford. From all these seditious and inflammatory articles, the indictment concluded, that the prisoner had acted a most unnatural part towards his own countrymen, had endeavoured to stir up the English to murder them, and had transgressed sundry acts of Parliament, viz. James I. Parliament 2. Act 43.; James II. Black Acts*, Act 100.; James VI. Parliament 8. Act 134.; Parliament 10. Act 10.; Parliament 14. Act 205.

However criminal the prisoner might be in exciting jealousies and dissensions between the English and Scots, it was truly absurd to charge him with having transgressed these statutes; for they related to the sowing dissension between the King and his people; and they were enacted before the union of the Crowns, at a time when the former of these nations was described in the statute-book, as '*our ancient enemies of England.*' Not only was the prisoner innocent of transgressing these statutes, but the Court of Justiciary had surely no jurisdiction over him, in an offence which consisted in having published a 'de-
'testable, firing, *blasphemous* thesis,' at the university of Oxford. In those times, however, it was sufficient, if some attention was paid to the forms, without the smallest regard to the principles of law and justice. King James knew, that, even armed with the terrors of the Star Chamber, he could not, in England, overwhelm the prisoner with that destruction which he meditated; he therefore embraced the illegal resolution of sending the prisoner

* *i. e.* printed in Saxon character.

1618 to be tried in his own country; a country where the transient gleams of fanaticism served only to cast a gloomy light athwart the regions of tyranny and slavery.

The indictment being read over, the prisoner judicially confessed his guilt, but declared, at the same time, that he committed this offence, while he was in a state of insanity. He craved pardon of God, the King, and his countrymen, and *came in the King's will, i. e.* submitted to his Majesty's pleasure. He expressed his hope, that his Majesty, being a gracious Prince, would incline to *mercy, which is God's right hand, rather than to justice, which is but his left.* And he entreated the Court to intercede in his behalf.

Being found guilty by the jury, the Court ordained him to be taken back to prison, and to be kept in irons till the King should be informed of his conviction, and till he should suffer an exemplary punishment. The Court met again on the 10th of September, when a warrant from his Majesty, directed to Lord Binning, Secretary of State, was produced, conform to which, sentence was pronounced on the prisoner, that he be taken to the cross of Edinburgh, and his right hand struck off; and thereafter his head to be struck from his body, his hand to be put upon the West Port, and his head on the Netherbow.

James Skene, for Treasonable Opinions and Declarations.

THE prisoner, who was brother to the Laird of 1680 Skene, was prosecuted at the instance of his Majesty's Advocate for high treason.* He was charged in the indictment with being accessory to the rebellion headed by Balfour of Kinloch, and Hackston of Rathillet, at Air's Moss and Bothwell-bridge; with having maintained the lawfulness of that rebellion, even in presence of the Duke of York, and of the Lords of Privy Council, and those of Justiciary; with having justified the excommunication of the King, and having maintained it was lawful to kill him, &c.

The proof adduced against the prisoner was his own confession, emitted before the Duke of York and Privy Council on the 13th November, 1680, of which the tenor follows.

He said, he did not know who were rebels, but denied that he was present at the battles of Bothwell-bridge and of Air's Moss. He thought the persons engaged in those insurrections were not rebels, for they were in defence of God's cause. He was not at the Torwood conventicle when the King was excommunicated, nor did he know who contrived it, but he thought the reasons of the excommunication just. He acknowledged the burning the Acts of Parliament, because they were *against the Covenant*; and

* Records of Justiciary, November 22, 1680.

1680 would not admit the authority of the King or Parliament in things that were against the Covenant. He did not know if any new insurrection was plotted; but he believed that God's people were always ready to take arms in defence of themselves and of the gospel; that he was one of God's people, and had resolved to give an testimony for the cause. He thought the killing of the Archbishop of St. Andrew's was not murder: that there is a declared war between those who serve the Lord, and those who serve the King against the Covenant; and that it is lawful to kill such in defence of the gospel: *that the King being excommunicated, and there being now a lawful declared war against him on account of the breach of the Covenant, it is lawful to kill him, and all those who are in opposition to the Covenant.*

He renewed his confession before the Court and Jury. He was desired to deliberate before he should sign it: he answered, he had resolved to sign it; he thought it his honour to do so; and he did it accordingly.

The jury unanimously found the prisoner 'guilty of the treasonable crimes and expressions mentioned in his dittay, and that by his own confession.' The Court sentenced him to be taken to the Cross of Edinburgh on the 24th of November instant, to be hanged on a gibbet till he be dead, his head to be separated from his body, and fixed on the Netherbow, and his whole estate, real and personal, to be forfeited.

Charles Lord Fraser, for High Treason, in proclaiming the late King James to be Righteous and Lawful Sovereign of this Realm, &c.*

IT was charged against the prisoner, that, contrary 1693 to his allegiance, he, in the month of June or July, 1692, went with his accomplices to the market-cross of Fraserburgh, stepped upon the cross, and, after three several *O Yes's*,† did three several times proclaim the late King James, and the pretended Prince of Wales, to be righteous and lawful King of this kingdom, and successor to the same, and that they cursed all who would say the contrary: then they drank, and caused to be drank, King James's good health, and that of the Prince of Wales, and cursed King William and all his adherents; drank to his confusion; uttered reproachful speeches of him, calling him *Burgar*, and *Burgar-Master* of the Hague, and saying that he was only Prince of Orange: that, for the greater solemnity, they fired guns and pistols from the Cross on the occasion, and forced some of his Majesty's subjects to drink treasonable healths: By all which the prisoner testified his rebellion against his Majesty's person and authority, and his treasonable intentions to depose the King; and did disown

* This family was raised to the peerage by Charles I. A. D. 1633. The title became extinct by the prisoner's dying without issue.—Douglass' Peerage, page 273.

† Records of Justiciary, March 29, 1693.

1693 the King's title to the crown, and did all that in him
 lay to incite the people to take arms: for which con-
 tempts and treasons he ought to be punished with
 death, and the forfeiture of his estate.

After a prolix argument, the Court found the in-
 dictment relevant to infer the pains libelled.

The following persons composed the assize: Lord
 Forrester, Lord Bargeny, the Master of Forbess,
 James Oswald of Singletoun, James Baird of Saugh-
 tonhall, Patrick Murray of Livingstone, Mr. George
 Scot of Giblestone, William Dick of Grange, Sir
 Alexander Gilmour of Craignillar, James Eleis of
 Southsyde, Sir Robert Milne of Binnie, Hugh Wal-
 lace of Inglishtoun, Alexander Nisbet of Craigintinnie,
 William Biggar of Woolmet, and Sir William Bin-
 ning of Wallyfoord.

THE PROOF.

Thomas Pyper, weaver, saw Lord Fraser come
 from the house of John Hay, vintner, and go to the
 Cross, and step upon it: he heard one in the com-
 pany cry three O Yes's, and proclaim the late King
 James and the Prince of Wales, and this was after
 some person bid him proclaim, *'to whom he answer-
 ed, what shall I proclaim, my Lord?'* After these
 proclamations, the witness heard King James's name
 mentioned, saw the people on the cross have drink
 with them, and heard the shooting of pistols. Adds,
 that Lord Fraser was on the cross at the same time
 with the man who proclaimed King James.

John Wood saw Lord Fraser and others go to the
 Cross, saw his Lordship on the Cross, heard a serv-

ant belonging to the company cry three several O 1693
 Yes's, and then proclaim the late King James and
 the Prince of Wales; and after the proclamation he
 heard two shots of a pistol. The witness carried wine
 to the company at the Cross.

Henry Finlayson saw Lord Fraser and others on
 the Cross drinking healths; their servants told him
 it was the late King James, and Prince of Wales's
 health: Lord Fraser and another gentleman held
 drawn swords to the deponent's breast, and forced
 him to drink some healths.

John Hay, vintner, deposed, that Lord Fraser
 went out of his house to the Cross, and the deponent
 went there also, and heard his Lordship drink King
 James's and the Prince of Wales's health. He heard
 also the firing of pistols.

Alexander Robertson heard a noise at the Cross,
 opened his window, and saw and heard a person
 clothed in red cry three O Yes's, and proclaim King
 James *as our righteous King*. The deponent, at the
 same time, saw the prisoner on the Cross, and heard
 the company drinking healths. He did not distinct-
 ly hear whose health, but heard the words, '*Bur-*
gar, the Hague, and Orange,' come from the com-
 pany.

James Hardie, servant to John Hay, vintner, saw
 Lord Fraser, and several others, go to the Cross, and
 the witness was employed to hold some of their
 horses. He heard and saw a footman make three
 O Yes's off the Cross, and begin a health to King
 James and the Prince of Wales, 'and bid the *ill man**

* A fanatical term for the Devil.

1693 take all 'that refused to pledge it.' He saw the prisoner, and others, drink the health, and heard some shots of a pistol.

James Scot saw Lord Fraser, and others, at the Cross; he saw and heard them drink King James's and the Prince of Wales's healths, and heard Lord Fraser curse those present who refused the toast. He heard four shots.

The Lord Advocate protested for an assize of wilful error, if the jury should acquit the prisoner. The prisoner protested in the contrary; because the Committee of Estates which declared King James to have *forfaulted* the Crown, and bestowed the same on William and Mary, solemnly enacted and declared, '*That assizes of error are a grievance.*'*

Seven Peers and eight gentlemen of distinction who were summoned to be upon the jury, were fined a hundred merks each, for not obeying the citation. The jury, of which Lord Bargeny was Chancellor, all in one voice found it not proved that the prisoner either actually proclaimed, or caused proclaim, the late King James, and the pretended Prince of Wales; but found it proved that he was present at the proclamation. Found, by a plurality of voices, that a proclamation was made at the Cross of Fraserburgh, of the late King James and the Prince of Wales; *but not in terms of the indictment, viz. as being righteous and lawful King of this kingdom, and lawful successor therein.* The assize, all in one voice, found it not proved, that the prisoner and his accomplices cursed

* Act of Estates, No. 18. April 13th, 1689.

all those who would say to the contrary. They 1693 found it proved, that the prisoner drank King James's health,* and that of the Prince of Wales: but found his cursing King William, and drinking to his confusion, and uttering reproachful speeches of him, and forcing people to drink treasonable healths, not proved. They found that pistols were fired; but did not find that it was by the prisoner's order. The Master of Forbess, the Lairds of Craigmillar, Livingstone, and Southsyde, desired it to be marked in the record, that they found the proclamation proved in terms of the libel. On the 16th of May the Court pronounced sentence on Lord Fraser, fining him in £200 Sterling.

* In the reign of George I. Alexander Crawford was fined L.50 Sterling, for drinking the health of King James VIII. and to his happy restoration, Rec. of Just. 21st Feb. 1715. And a Highland Minister was turned out of his meeting-house for three years, for not praying for King George by name, but for the '*Supreme in authority who sits upon the royal throne;*' and this at a time when there was no statute for praying for the King by name, except that which ordained the clergy to pray for *Queen Ann, and the Princess Sophia*: nor any law for it, but a proclamation of the Lords of the Regency. Rec. of Just. 11th, 14th, 18th, 19th, 25th July, 1715.

Captain Simon Fraser of Beaufort, and many other persons, mostly of the Clan Fraser, for High Treason, in forming unlawful associations, collecting an armed force, occupying and fortifying houses and garrisons, imprisoning and ravishing persons of distinguished rank, and continuing in arms after being charged by a Herald to lay them down.*

1698 **THIS** is the only case I know of since the Revolution in which a person was tried in absence before the Court of Justiciary; a proof led, a jury inclosed, a verdict returned, and sentence pronounced, forfeiting life and estate, honours, fame, and posterity. The first instance of this tyrannical mode of proceeding was the illegal sentence upon the Rebel Covenanters after the battle of Pentland, which was afterwards rescinded by act of Parliament. The rebels at Bothwell-bridge met with the same treatment; and the like was repeated after the defeat of Monmouth.

The following is one of the most singular prosecutions in our criminal record: whether we respect the stretch of law that was made to convict the absentee, or the savageness of his conduct, or the absolute dominion that he possessed over his followers, and directed to purposes the most shocking to human nature.

* The celebrated Simon Lord Lovat.

By the law of Scotland, outlawry, even for treason, inferred the forfeiture only of personal estate. It was sanctioned by statute, that trials for treason could not be taken in absence; but that the whole accusation,* argument, and evidence, should be led in presence of the accused, and no otherwise. So anxiously did the professional lawyers adhere to this form, that, as our jurisprudence admitted, under certain limitations, of trial after death,† for this heinous offence, on such occasions the bones of the deceased were dug out of the grave, and formally presented in Court.

When the Covenanters were defeated in the battle of Pentland, a desire to arm insulted majesty with additional terrors, or to enrich the servants of the Crown with unlawful spoil, induced the Ministers of Charles to attempt, in absence of the accused, the trial of those rebels, and the forfeiture of their estates. And, although the complaisant disposition of Parliament gave every reason to conclude that they would not have hesitated to pass a law to this effect; yet it suited better the views of a tyrannical administration to operate this innovation in law, by the decree of Judges who were appointed, and might be removed at pleasure, than by the authority of the Great Council of the Nation.

Before the Court of Justiciary proceeded to such

* Bankton's Inst. vol. II. p. 251; Erskine's Fol. Inst. p. 733.; James VI. Parl. 11th, c. 90.; Mackenzie's Crim. Tit. Treason, sect. 22, 23.

† See trial of the Earl of Gowry, p. 23. of Logan of Restalrig, p. 54.

1698 an important innovation,* so little idea *was then entertained* of its supremacy and infallibility,† that the Court of Session was consulted on the occasion. After tampering with the Judges, a memorial and queries were laid before them by Sir John Nisbet, King's Advocate, and Lord Bellenden, Treasurer, depute, stating a variety of arguments, by inference and analogy, to show, that, if the Parliament could proceed to forfeit after death, why not the Court of Justiciary; and, if either could try after death, why not also in absence, since 'what is just before Parliament, is just and warrantable before other judicatories.' Upon this and the like notable arguments, the Lords of Session delivered an opinion, declaring, that, upon sufficient proof being taken before the Judges and assize, they might proceed in absence to sentence, and to forfeit persons guilty of high treason. Thus fortified, his Majesty's Advocate prosecuted, in absence, Colonel Wallace, William Muir of Caldwell, and some other gentlemen; and a verdict being found against them by the jury, the Court sentenced them to be put to death, as traitors, when they should be apprehended, and their whole estates, real and personal, to be forfeited.‡ From

* Mackenzie's Criminals, p. 30. Wodrow's History of the sufferings of the Church, vol. I. p. 267.; Appendix, No. 14, 15, 16, 18.; vol. II. p. 115, 586.; Charles II. Parliament 2. c. 11.

† It is now alledged, that no appeal lies from the Court of Justiciary to the House of Lords; and a judgement, indeed, to that effect, has been pronounced. As no man can command his faith or his judgement, I have never been able to discover *either the legality or propriety of this decree.*

‡ Muir of Caldwell's estate was gifted to General Dalziel, commander of the forces at the battle of Pentland,

a consciousness of the illegality of the sentence, it 1698
 was solemnly ratified in Parliament; trial in absence
 was adopted as a part of our law; and, in consequence,
 two of the most distinguished personages in the nation,
 the Duke of Monmouth, and Fletcher of Saltoun, were
 condemned and forfeited, the former *when dead*, the latter
 when out of the kingdom.

Had the torrent which overwhelmed the lineal
 succession of our Sovereigns issued pure from the
 fountain of liberty, and in its wide and rapid course
 been contaminated by no foul stream, *trial in absence*
 would have been enumerated in the list of those
 illegal and grievous assumptions of power upon
 which the estates of Scotland declared King James
 to have forfeited his right to the crown. And the
 opinion of the Lords of Session on this head, as well
 as on the two other cases stated in '*the Claim of
 Right*,' would have been declared to be contrary to
 law. But it was deemed prudent to preserve this
 statute as a security for the good behaviour of the
 numerous exiles who followed their Prince to the
 Court of St. Germain. A law was accordingly
 passed,* rescinding the act 1669. c. 11. in so far as
 it ratified the forfeiture of the Covenanters; but not
 repealing the act itself, which might now be turned
 as an engine of oppression upon the party which
 contrived it. It must be acknowledged, however, that
 King William's Ministers made no rigorous exercise

* William and Mary, Parl. 1. Ses. 2. c. 31. The most approved commentator on the Scottish law, has so far misunderstood this act, as to say, that the act 1669 was repealed by it. Erskine's Fol. Inst. p. 733.

1698 of this law. The Earls of Melfort, Middleton, and Lauderdale, and *ninety gentlemen*,* were summoned before the Court of Justiciary, in one day, to stand trial for various points of treason; in particular, for entering into the French service when that state was at war with his Majesty, and for rising in arms against the King. They failed to appear, and sentence of outlawry only was pronounced against them.

Tyrannical as this statute was, Captain Fraser could not have been convicted upon it but by an obvious wresting of the law; for it authorised trial in absence, only in 'cases of treasonable rising in arms, and open and manifest rebellion.' Now, it is altogether absurd, to construe the collecting of an armed force for the purpose of *private rapine*,† into *treasonable rising in arms, and open and manifest rebellion*.

It will be proper to state the motives which induced Captain Fraser to perpetrate the barbarity and villany which gave occasion to this trial. On the death of Hugh, tenth Lord Lovat, the title and estate of Lovat were disputed between his Lordship's daughter, heir of line, and Thomas Fraser of Beaufort, the Captain's father, heir-male. The Captain wisely proposed to do away the contest, by uniting their persons and pretensions, and there was not a disparity of years to render such marriage any-ways absurd. With this view, he privately paid his addresses to the young lady, and one Fraser of Tenecheil was made the confidant of the amour. The Captain ob-

* Rec. of Just. 23d July, 1694.

† Records of Justiciary, 27th June, 12th July, 5th and 6th September, 1698.

tained her consent, and she actually eloped from her mother's house of Castle Downie, under the conduct of the mutual confidant; but the person whose finesse was employed to accomplish the intrigue, from whatever motive of fear or of venality, of caprice or of remorse, blasted it at the moment, when it was sure of success. He forced the lady to return to her mother, to whom he disclosed the intrigue. 1698

It was no longer thought safe for the lady to remain at Castle Downie, as this seat was in the domains of the clan Fraser, over whom the Captain possessed great influence. She was therefore conducted under a proper escort to Dunkeld, a house of her uncle's, the Marquis of Athole, and this Lord prevailed on his niece to accept as a husband *the Master of Salton*. The intended bridegroom set out for Dunkeld to celebrate the espousals, accompanied by Lord Mungo Murray. As the Captain foresaw in this match the ruin of his hopes, he embraced the resolution of preventing the marriage by force; and (if he could not possess himself of the heiress) of compelling a marriage with the *Dowager*, who, in virtue of her jointure, was in possession of a considerable part of the estate of Lovat: and this wild enterprise was to be accomplished by such deeds, that the stern contrivance of the principal actor is less shocking than the abject submission of his accomplices.

The substance of the indictment against Captain Fraser was, That he and his associates came to a house belonging to Mr. Fraser of Strichen, and there entered into an unlawful bond of association for the prosecution of certain wicked designs: that they

1698 raised a body of four or five hundred men in arms, in order to support Captain Fraser's pretensions to the estate of Lovat: that they seized the persons of Lord Salton and Lord Mungo Murray, and made them close prisoners for six or seven days in the house of Finallen; erected gallowses before their windows, and afterwards carried them by force to islands and mountains, and treated them very harshly: that Captain Fraser and his associates marched in form of war to the house of Castle Downie, the seat of Lady Dowager Lovat, garrisoned the house, plundered the effects, and put armed guards upon the different apartments, and attempted to compel her Ladyship to agree to certain deeds which they endeavoured to extort from her; but she remaining resolute, the Captain all of a sudden took up the mad and villainous resolution of forcing her to marry him: that, accordingly, one of his associates, Mr. Robert Monro, minister of Abertarfe, pronounced the marriage ceremony: that the Captain, by the aid of his associates, did commit rape and forcible abduction upon the person of Lady Lovat, attended with circumstances of excessive barbarity: and that they continued in arms, after having been charged by a Herald to lay down their arms, set the Lady at liberty, and surrender themselves prisoners.

His Majesty's Advocate represented to the Court, that by an act of Parliament of King James VI. summonses at his Majesty's instance, 'against islandmen, 'highlandmen, or borderers,* *ubi non patet tutus accessus*, be made at the mercat cross of the head

* James VI. Parliament 11th, act 66.

'burghs of the next shires in the Lowlands:' that 1698
 Captain Fraser and his followers continued in arms
 and open rebellion, and therefore craved their Lord-
 ships to grant warrant for an *edictal citation* being
 executed against the defenders, which was accord-
 ingly granted.

On the 5th of September, his Majesty's Advocate
 proceeded in the trial, declaring that he insisted for
forfaulture in absence against Captain Fraser, and
 nineteen other gentlemen specially named; and that
 he restricted the libel against the defenders to trea-
 sonable rising in arms, and open rebellion, with all
 the aggravations charged in the indictment. The
 Court found the indictment thus restricted, and thus
 presented, relevant to infer the pains of treason.

THE PROOF.

Alexander Fraser, younger of Balnain, deposed,
 That at the time specified in the indictment, he saw
 a paper subscribed by some of the accused, and de-
 livered to Lord Fraser, of the tenor of the bond of
 association now read in Court. He was at Finallen
 when Lord Salton and Lord Mungo Murray* were
 brought prisoners, and were there committed to close
 custody, and gallowses erected before the windows of
 the apartments where these Lords were confined.—
 He saw then at Finallen, about two or three hundred
 men in arms, under the command of Captain Fraser,

* Son to John first Marquis of Athole, by Lady Amelia Stan-
 ley, daughter of James Earl of Derby, and brother to the Lady
 Dowager Lovat, mentioned in this trial.

1698 and different parties of armed men were sent to and fro, between the houses of Finallen and Castle Downie. He was also at the latter of these houses, where he saw Lady Lovat and also Captain Fraser, and a number of armed men standing sentry in the house, and even on the threshold of my Lady's apartment. He went to my Lady's chamber door, whom he heard sighing; but the bagpipes were playing in the next room; this was about day-break, and my Lady's women were in another room weeping, and sentinels standing over them.

Thomas Fraser of Gartlobeg, in September preceding, saw Captain Fraser, &c. &c. to the amount of about sixty or seventy men in arms, horse and foot; the Captain thanked them for assembling so readily, and desired them to be ready at a call. In October, Captain Fraser and the deponent coming from Inverness, met in the wood of Bonchreive Lord Salton and Lord Mungo Murray, who were returning from Castle Downie. The Captain gave orders to his followers to seize Lord Salton *dead or alive*; went close up to them with cocked pistols, and commanded them to yield themselves prisoners. Lord Salton asked, for what cause? to which the Captain replied, '*because it was his pleasure.*' These Lords were dismounted from their own horses, disarmed, put upon mean ponies, surrounded by guards with their muskets levelled, and durks drawn, and thus conducted to the house of Finallen, where they were kept prisoners for several nights, in separate apartments, under a strict guard. The deponent *saw the Fiery Cross,** and heard the Coronach sent through

* This mode, by which the Highland chieftains convoked their

the country; upon which between three and four 1698
 hundred armed men assembled at Finallen under
 command of Captain Fraser, who detached a party
 to the house of Castle Downie, where sentinels were
 put upon the rooms, particularly my Lady's cham-
 ber, for seven or eight days. He heard the Captain
*demanding oaths of fidelity of such of the gentlemen
 of his name as he suspected; and such as he did not
 suspect he only took their promises; and some of them
 did swear, and some promise.*

Robert Spence saw Lord Salton and Lord Mungo
 Murray carried prisoners by Captain Fraser to the

clans to arms, is, I apprehend, of greater antiquity than their
 conversion to Christianity; with the difference only of change of
symbol. Anciently, when the chief desired to assemble his clan,
 he killed a goat with his own sword, and dipped a half burned
 stick in the blood. This he gave to one of his vassals, who bore
 it with all dispatch to the next village, where the first person he
 met was obliged, by the feudal customs, to relieve him, and carry
 forward this summons to arms; and thus it was carried from vil-
 lage to village through the chieftain's domains. Upon their con-
 version to Christianity, the Priests would no doubt discover in the
 killing of a goat a species of heathen sacrifice. It was proper that
 a symbol should be adopted more analogous to their new religion;
 and what so suitable as the cross, which, under the splendid name
 of the *Labarum*, blazed in the heavens, conducting the Christian
 Emperor to victory and glory. A slight pole, with a bit of stick
 infixed in the figure of a cross, burned at the ends, was substitut-
 ed in the place of that dipped in goats' blood: and this ceremony
 was performed even in the late rebellion. There were two sorts of
coronachs; that properly so called was the dirge which accompa-
 nied the deceased to their grave; the other, which is here alluded
 to, was a sort of war song, or dismal howl, which the women
 set up on seeing the *fiery cross*, from the anxiety they entertained
 about the safety of their husbands and friends in the approaching
 hour of battle.

1698 house of Finallen, where they were confined about a week in separate apartments, and sentinels put over them. Lord Salton and Lord Mungo Murray were then carried to Castle Downie; and the force commanded by Captain Fraser, at this time, consisted of about five hundred armed men, marching with two pair of colours. The men were sworn upon their durks to be faithful to the Captain, and never to desert him. They kept Lady Lovat prisoner for some time at Castle Downie, and afterwards carried her along with them. When the Captain heard that Lord James Murray, with some gentlemen, and a party of red coats, were coming to rescue my Lady, he again sent the fiery cross to summon the country to rise in his defence; and he continued in arms till about Christmas.

John Monro, late footman to Captain Fraser, saw the Captain, and the whole other persons now insisted against (for forfeiture), and about three hundred more, with colours displayed, and pipes playing, under the Captain's command, at Finallen, the night Lord Salton and Lord Mungo Murray were made prisoners. He saw the men *drawn round the colours, and sworn upon them; and upon the points of their durks*, to adhere to the Captain. He heard the coronach the night Lady Lovat was carried from Castle Downie. About Martinmas the Herald left his charge against the Captain, &c. 'in a cloven stick at the river side, opposite to the Isle of Eagles;' and, after that, the Captain and others continued for some time in arms.

Amelia Reoch, late servant to Lady Lovat, deposed, that Captain Fraser, with a party of armed

men, came to Castle Downie. He put sentinels with drawn swords upon and within Lady Lovat's chamber, made her three waiting-maids be carried by force out of the room, and detained prisoners.— About two in the morning, two armed men carried the deponent back to my Lady's apartment, whom she found sitting on the floor, her hair dishevelled, her head reclining backwards on the bed, Donald Beaton pulling off my Lady's shoes, and the Captain holding burned feathers and aquavitæ to her nose, her Ladyship being in a swoon. They commanded the deponent to take off my Lady's clothes; but she spurned at the deponent with her feet, shewing the greatest reluctance; upon which, Fraser of Kinmonavie held up my Lady in his arms; the Captain pulled down her petticoats, and sought a knife from Hugh Monro to cut off her stays; but, he having none, the Captain ordered Kinmonavie to cut them off with his durk, which was done accordingly. The deponent was put out of the room; and, when she was going 'over the close,'* she heard 'my Lady's' cries, although the bagpipes were playing all the 'time in the room next to her Ladyship's.' In the morning, when the deponent returned, she saw my Lady's head hanging over the bed-stock, her face swoln, and her Ladyship to all appearance out of her judgement; she spoke none, but gave the deponent a broad stare; even some days after, she did not know her own brother, Lord Mungo Murray; and, when Dumballoch's Lady came into the room, and called Lady Lovat 'Madam,' she answered, 'call

* The Court-yard.


1698 'me not Madam, but the most miserable wretch
'alive.'

Janet Fraser deposed, that Lady Lovat's waiting-maids were forcibly turned out of her room by Captain Fraser, about twelve o'clock at night. My Lady clung by the deponent, and, when she was torn from her Ladyship, fell on her face on the floor. Next morning, when the deponent saw my Lady, her head was hanging over the bed, and she was out of her judgement, mistaking the deponent for Lady Catherine Murray, Lady Lovat's sister, who had been dead several years.

Christian Maclean deposed, that, on the night of the '*sham-marriage*,' she was in the next room to Lady Lovat, and, notwithstanding the bag-pipes were blowing all the while, she heard my Lady crying and sobbing, and praying, 'Lord have mercy 'on her soul.'

The jury returned a verdict finding the indictment proved; and the Court adjudged Captain Fraser,* and the other persons against whom the verdict was found, to be executed as traitors, at such time, place, and manner, as their Lordships should appoint, to undergo the punishment ordained by law for traitors, 'their name, fame, memory, and honours, to be extinct, and their arms to be riven furth 'and deleted out of the books of arms; so that their

* Captain Fraser was also prosecuted before the Court of Justiciary for a rape by the party injured, Lady Dowager Lovat, and was outlawed for not appearing to stand trial. Rec. of Just, 17th February, 1701.

‘posterity may never have place, nor be able here- 1698
‘after to bruik or enjoy any honours, offices, titles, 
‘or dignities, and to have *forfaulted* all their lands,
‘heritages, and possessions whatever.’

This sentence, which was severer even than that commonly pronounced on traitors, seems to be copied from the sentence pronounced by Parliament, after death, on Logan of Restalrig and the Earl of Gowry. As Captain Fraser, in the rebellion 1715, although supposed to be a keen Jacobite, supported the House of Hanover, King George I. granted him a pardon and remission of this sentence:* and he claimed and obtained the contested title and estate of Lovat. He joined the next rebellion against the family that pardoned and restored him; and his house of Castle Downie, which had witnessed his foul crimes, was burned by the royal army before his eyes, and those of three hundred of his clan, a few days after the battle of Culloden. How he lost his titles, and estate, and his life also, is known to every one; so perhaps he is the only person upon record who was twice condemned, twice forfeited, and whose estate was twice restored.

* Paper Register of Chancery, B. 16. No. 134. Remissio et rehabilitatio Simonis Fraser de Beanfort, Domini Lovat, de crimine perduellionis aliisque infrascript. St. James's, 10th March, 1716.

Mr. John Thomson and Charles Auchmouty, servants to the African Company, for Treason and Leasing-making by designing and causing to be engraved a Political Print.

1701 **T**HIS trial, with the facts which gave rise to it, presents us with a remarkable picture of liberty and fortitude in Parliament, of expiring struggles for tyranny in the Sovereign, and of the final victory of secret influence over Parliamentary independence.

In the year 1695, an Indian and African Company was established in Scotland. £400,000 Sterling were subscribed by such proprietors as were natives and residents. The Company fitted out six ships of force and burthen,* laden with various commodities, which sailed from the Forth. They planted, by the name of *Caledonia*, a colony on the isthmus of Darien; and, from the establishment of this Company, and its colony, the nation universally flattered itself with the eager and unbounded prospect of extended trade and empire. From the jealousy the English, Dutch, and Spaniards, entertained of this colony, it may be presumed that the prospects which this nation derived from it, were at least plausible.

But, besides the opposition of rival powers, *Caledonia* experienced that of her Sovereign, whose po-

* Act of Scottish Parl. 26th June, 1695; Lockhart's Mem. p. 29.; De Foe's Hist. of Union; Scott's Hist. p. 710.; Edinburgh Gazette, No. 8. No. 36.

litical views, or personal attachments, led him to 1701 embrace the hostile spirit of his other dominions.—

The colony was attacked, was abandoned; the vessels were captured, the adventurers were killed in battle, were executed as pirates, or died of famine; and the company was ruined. When the fatal tidings were received at Edinburgh, the sense of injury and disappointment was so strong as to burst forth with a fury which threatened immediate rebellion; and the great officers of state had to retire for a time to screen themselves from popular resentment.

When the Parliament met, the first symptom of their displeasure, at the enemies of the African Company, was to pass an order for burning, by the hands of the hangman, a pamphlet, entitled, ‘A Defence of ‘the Scots abdicating Daïen,’ and requiring the Lords of the Treasury to pay a reward of £6000 Scots* to any person who would apprehend William Herreis, the alledged author, and bring him before a magistrate. Soon after, they passed a resolution, declaring, that the votes and address of the Parliament of England, in December, 1695, and the address of the House of Lords in February last, were *undue intermeddlings† in the affairs of this kingdom,*

£.500 Sterling. Rec. of Scottish Parl. 16th Nov. 1700, 9th, 10th, 13th, 14th, 15th, 17th, Jan. 1701.

† The *intermeddlings* complained of were, that both Houses of Parliament had addressed the King, representing, that the act to which he had given the royal assent in Scotland, for erecting a Company trading to Africa and the Indies, granting them an exemption from public burdens for twenty-one years, would make Scotland a free port for *East-India commodities*, enable her to undersell England at foreign markets, and be of great prejudice to

1701 *and an invasion of the sovereignty and independence of our King and Parliament.* They next resolved, 'That the memorial presented in his Majesty's name, as King of Great Britain, to the Senate of Ham-
'burgh, 7th April, 1697, by Sir Paul Rycaut, then
'resident in that city, and Mr. Grosset, his Majes-
'ty's Envoy Extraordinary at the Court of Lunen-
'burgh, *was most unwarrantable, containing manifest*
'*falsehoods, and contrary to the law of nations, inju-*
'*rious to his Majesty, an open incroachment upon the*
'sovereignty of this Crown and Kingdom, the oc-
'casion of great losses and disappointments to the
'said Company, and of most dangerous consequence
'to the trade of this nation.' Moved, 'That, who-
'ever advised his Majesty's answer to the address of
'the Parliament of England against our Indian and
'African Company, are enemies to this kingdom,
'and, if subjects thereof, are traitors to their King
'and country, and be prosecuted accordingly.'—
After a debate, the motion was withdrawn.

They also resolved, that the proclamations issued by the English plantations against the African Com-
pany, particularly that against furnishing any provi-
sions or necessaries whatever to their colony, direct-
ly or indirectly, and even debarring them wood,
water, and anchorage, were injurious to the Com-

the trade and revenue of the latter kingdom; especially when Scotland shall have settled plantations in America. The King returned the following answer: '*I have been ill served in Scotland;*
'*but I hope some remedies may be found to prevent the inconveni-*
'*encies which may arise from this act.*' Journal of House of
Lords, 13th December, 1695, 8th February, 1699. House of
Commons, 14th, 18th December, 1695.

pany, barbarous to the adventurers, contrary to the 1701 law of nations, and a great occasion of the loss of the colony. Resolved, that this colony was a legal and rightful settlement holding of the Crown of Scotland; and *moved*, that the conduct of the Spaniards to the said colony was an open hostility against the Crown of Britain, and that satisfaction ought to be demanded. All the resolutions were passed *nemine contradicente*, and the motion was delayed.

These formidable resolutions, however, by the dexterity of William's Ministers, vanished in smoke; for the Court party moved an *address* to the King on the resolution, asserting the Company's right to the colony; while the country party contended, that, in the present circumstances, an *act of Parliament* was requisite for securing the Company's rights, as well as for regulating the conduct of the persons engaged in the prosecution of them. A debate and division on this question taking place, it carried for an *address* by an hundred and eight against eighty-four.*

* The Peers and Commons of Scotland formed but one House. Those who voted for an *address* were,

| | |
|--|------|
| Peers, | 41 |
| Commissioners for Barons, <i>i. e.</i> Knights of the Shire, | 32 |
| Commissioners for Boroughs, | 35 |
| | —108 |

It is perhaps superfluous in me to add, that all the officers of state were in this list.

Those who voted for an *act of parliament*, were,

| | |
|--|-----|
| Peers, | 20 |
| Knights of the Shire, | 43 |
| Representatives of Boroughs, | 21 |
| | —84 |

1701 And the whole of the minority entered a formal dissent.

This address recapitulates the grievances of the African Company, and the resolutions of Parliament mentioned above, omitting entirely however that for demanding satisfaction of the Spaniards; it concludes with praying his Majesty's protection and countenance against the violence of Spaniards, and of English ministers abroad.

It was the parliamentary division upon this address, which was the subject of the political print that gave occasion to this trial.

The print represented Scotland in the figure of a woman, wearing a crown, having the name of *Scotia* over her head, and supported by the *eighty-four dissentient Members*. These were entitled, '*Caledonia's supporters*.' They were distinguished with the following motto, encircled with wreaths of laurel, '*patriæ fautoribus*;' and the woman addressed them in these words:* '*Take courage, and act as men that hold their liberty, as well as their glory, dear*.' Below, an angel spoke thus to a multitude of little figures which he was driving with thunderbolts to hell, '*Procul, o procul esto profani*.'—(These figures were charged in the indictment as representing the majority in Parliament.) And in the midst of the flames, lay a person who was tormented by a fiend, that addressed him in these words: '*Venidit hic auro patriam*.'

His Majesty's Advocate produced before the Court of Justiciary an act of the Privy Council, authorising

* Res. of Just. 14th, 21st, April; 23d, 24th, May, 1701.

him to prosecute the prisoners on account of this 1701 engraving, ‘*for such crimes, and upon such laws, as his Lordship shall think fit to libel.*’

Thus authorised, his Lordship mustered up against the prisoners *seven pages folio of indictment*, charging them with the breach of sundry acts of Parliament* against *leasing-makers*, and those who presume ‘publicly to declaim, or privately to speak or write any purpose of reproach or slander of his Majesty’s person, estate, or government, or to deprave his laws, or misconstrue his proceedings, whereby any dislike may be moved betwixt his Highness and his nobility and loving subjects, in time coming, under the pain of death.’ Also, charging the prisoners as transgressing the acts against those who dispute the authority of the Estates of Parliament; and, likewise, as transgressing the statutes against those who conspire to levy war against the King. *Nevertheless*, (the indictment concludes,) the prisoners, by designing the said print, are guilty of the said crimes. A description of the print, and an application of it to the laws, then follow. Turgidity of stile, and strained conceit, are substituted in the vacant places of law and reason. And the conclusion of the libel, which is *worthy* of the premises, is, that these crimes being found proved, the prisoners are thereby guilty of *leasing-making and treason, and subject to the pain of death.*

The prisoners were heard by counsel, and *informa-*

* The acts libelled against the prisoners were, James I. Parl. 2. c. 43.; James V. Parl. 6. c. 83.; James VI. Parl. 8. c. 130. and 134. and Parl. 10. c. 10.; Charles II. Parl. 1. sess. 2. c. 2.

1701 *tions** were lodged on either side. The information for his Majesty's Advocate is one of the most prolix and inconclusive pieces of composition that I recollect in judicial procedure. The information for the prisoners maintains, *1mo*, That the statutes against *leasing-making*, &c. are obsolete, and are specially declared to be so in the *Claim of Rights*, as being in the number of those upon which the Earl of Argyle was convicted. *2do*, That, to extend criminal laws, and capital punishments, by parity of reasoning; to infer leasing-making, and sedition, and treason, from a hieroglyphic, a print, especially the print libelled on, is contrary to those general principles of law which have been established by the wisdom of the learned, as requisite for the security of the governed. In opposition to these, it was maintained by his Majesty's Advocate, that, although the forfeiting the Earl of Argyle upon *stretches* of obsolete laws, was declared contrary to law, it did not thence follow that those against leasing-making were obsolete, because the Earl was indicted upon acts not founded on against the prisoners; and it was not declared in the *Claim of Rights*, that *all the acts* upon which the Earl was indicted were obsolete. *3tio*, With regard to the print, it was argued, if the intention of leasing-making and misconstruing was plainly discernible in it, this 'subtle manner of conveying the 'poison doth render it rather more wicked and dangerous than the most direct and blunt calumny.' The other parts of these voluminous informations require no notice.

* So law papers, in Scotland, which contain a state of the fact and argument, are sometimes called.

The Lords pronounced the following interlocutor: 1701
Find the indictment, and qualifications thereof, do not infer the crime of treason, or the pain of death, but sustain the same *relevant to infer an arbitrary punishment.*

THE PROOF.

Alexander Kennedy of Glenure deposed, that the prisoner, Thomson, came to his house one evening, in company with the other prisoner, Auchmouty, and brought with him the copperplate now produced in Court, desiring the deponent to cast off impressions of it, which he refused, unless a warrant from authority was produced, as he suspected it might relate to affairs of state. Next day, he observed the prisoner, Auchmouty, go up to his printing-house; and the deponent following him, saw the copperplate in the press, and one of his servants casting off copies. He snatched up one of them, and carried it straight to the Lord Advocate. One of the maces* of council then came to the deponent's house, and required him to bring the copper-plate, and all the copies, before the Lords of Privy Council, then met, which was done accordingly; and Auchmouty was present when they were seized.

George Burgon, servant to the preceding witness, deposed, that the two prisoners, and Robert Wood, engraver, brought the said copper-plate to him, and came once and again requesting the deponent to cast off impressions of it, which he as often refused till

* Mace-bearers.

1701 they should obtain his master's order. At length, his mistress sent for him, and the two prisoners were then with her, and she desired him to cast off the impressions required, and now produced in Court, which he did accordingly. The prisoners at this time engaged to stand between him and all hazard that he might incur through casting off the impressions. Deposed, that Auchmouty furnished him with the paper.

Robert Wood, engraver, swore, that the two prisoners brought the drawing to him from which the copper-plate was done, and desired him to engrave it. This he did accordingly, and was paid by them for it, at the agreed price of £6 10s. Scots.* Deposed, That the prisoner, Thomson, said the drawing was done by him. The deponent heard both prisoners desire Burgon, the printer's servant, to cast off the impressions.

THE VERDICT.

The assize, by the mouth of Sir James Dick of Prestfield, their Chancellor, all in one voice found the indictment and qualifications—*not proved*.

I presume the reader will agree with me, that the proof of the fact, I mean, of the prisoner's having caused the engraving to be executed, is complete. It must, therefore, have proceeded from their conviction of the prisoners' having done nothing declared criminal by law, that the jury found *not proved*.

* 10s. Sterling.

They had no other way of acquitting the prisoners; 1701 for juries had not then recovered their privilege of finding *guilty or not guilty*.*

Archibald Macdonald, son to Coll Macdonald of Barisdale, as attainted of High Treason.

THE prisoner was not served with any indictment 1754 or summons of treason; but received intimation from the Crown lawyers, that he was to be brought before the Court of Justiciary on the 11th of March, in order to have execution awarded against him; or to show cause why execution should not be awarded. The Lord Advocate, in a petition to their Lordships, on the 5th instant, prayed for a warrant to cite witnesses to prove, that the prisoner was the identical person designed in the act of attainder, *son to Coll Macdonald of Barisdale*; and their Lordships granted warrant accordingly.

His Majesty's Advocate-depute represented to the Court, that, by an act of attainder against Alexander Earl of Kellie, and others, passed in the reign of his present Majesty (George II.) the prisoner stood attainted of high treason: that the Crown lawyers had received his Majesty's orders to insist with their Lordships for an *award of execution* against the prisoner,

* See *infra* Tit. Mur. Cases of George Cumming, and Carnegie of Finhaven.

1754 which, in the counsel's opinion, the printed act of Parliament, being a public law, sufficiently authorised: but, to remove all doubt, they had procured, and lodged with the clerk of Court, an *exemplification* of the act of attainder under the Great Seal of England. The Advocate-depute, therefore, craved that their Lordships would order the prisoner to be brought to the bar, and would appoint a day for his execution. He was brought to the bar accordingly, the act of attainder and exemplification thereof were read over to him,* the motion for his execution was renewed. The Lord Justice Clerk then asked the prisoner, if he had any cause to show why execution should not be awarded against him in terms of the act? He replied to the following purpose: That he did not understand himself to be the person attainted by this act. He was then a boy recently from school, and under the influence of a father unfortunately engaged in the late rebellion. Had not his father been able to justify or atone for his conduct and the prisoner's, could it be supposed that the father would pass unattainted, and his son, a minor, be devoted to punishment. His special defences then were: That there was no sufficient evidence of the act of attainder on which execution was craved: that he was none of the persons named in the act now read; for his name was *Macdonnell*, and his father was designed not of *Barisdale*, but *Inverie*. And that the condition under which the act of attainder could alone take place, never existed; for the prisoner surrendered himself to a justice of peace before the 12th of July, 1746.

* Rec. of Just. 2d, 5th, 11th, 13th, 20th, 22d March, 1754.

Counsel were then heard for the prisoner, who ¹⁷⁵⁴enlarged on the defences he had stated, offered to instruct them by evidence, and requested that the Court would remit the facts undertaken to be proved, to the cognisance of a jury.

The lawyers for the Crown began by refuting the idle cavilling of the prisoner's counsel, at the evidence of the act of Parliament upon which the prisoner was said to be attainted. They next are successful in obviating the prisoner's objections of a misnomer. As to his plea of a surrender in terms of the act, they alledged it was surprising a defence so valid, if true, should, during his tedious imprisonment of eight months, be kept a profound secret, and now for the first time be urged in his behalf. But a surrender to a justice of peace, who, though nominated in the commission, had not taken the oaths to Government, nor officiated in that capacity, or a surrender made at an improper time, when the justice of peace could not commit such person to prison, would not be held good, as not having been made according to the intent of the act. Further, no testimony of the fact was admissible, but the record of surrender; and it could not be proved by *parole* evidence. They argued, that the prisoner's plea of a surrender was contradictory to his other plea of a denial, that he was the person meant to be attainted by the act. *Lastly*, They alledged it was not necessary, in this case, to try the prisoner's defences by jury; for, although trials by indictment must be by jury, yet incidental questions, such as the *lunacy of the prisoner*, or the identity of a criminal, who had made his escape after sentence

1754 of death had been pronounced upon him, are, by the law of Scotland, tried and judged by the Court, without any intervention of a jury: nor is the case altered by the statute 7th of Queen Anne, chap. 21. declaring, that trials for treason in Scotland should be the same as in England; for this was *not a trial* for treason, the prisoner being already ‘*tried, convicted, and attainted by act of Parliament;*’ and that nothing now remained but to award execution of the sentence which the law had pronounced. And although, in England, the prisoner’s exception at execution being awarded against him, would have been tried by a jury *de circumstantibus*, ‘that can have no effect here, as the Court is not tied to the *forms of England in the trial for treason.*’

The counsel for the prisoner replied, that the act of attainder is not absolute, but conditional; and he offered to prove, that the condition under which alone the attainder was to take place, viz. the prisoner’s not surrendering himself before a day certain, never existed, for the prisoner did actually surrender himself to a justice of peace within the time prescribed by the act. They argued, it was not necessary to prove that the justice of peace had taken the oaths, or officiated in that capacity, for these are not mentioned as requisites in the statute: that the prisoner had fairly submitted to justice; and Sir Alexander M'Donald, to whom he surrendered himself, was a gentleman of known affection to his Majesty’s government, who at that very time was at the head of a considerable body of militia employed in his Majesty’s service: that his not being committed to jail did not affect the validity of the surrender; for, even

supposing it to have been Sir Alexander's duty to ¹⁷⁵⁴ have committed him, it was absurd, that, by reason of Sir Alexander's ignorance, or neglect of duty imposed on him by the statute, the prisoner should incur the pains of treason: that the prisoner must be held as having been under the protection of government, not only from his surrender to a justice of peace, but likewise from his having received a pass from the Earl of Albemarle, commander of his Majesty's forces, by virtue of which he remained unmolested; but, in the month of August, 1746, he and his father, then in the country of Moidart, out of private pique, were seized by certain of the Clan Cameron, put on board a vessel, carried to France, and there kept in close custody for a twelvemonth. On their escape from France, and return to Scotland, both father and son were apprehended by a party of his Majesty's forces; the father died in confinement; but the prisoner, upon a just representation of these facts, was immediately set at liberty, and remained peaceably and openly at Inverie till July last: that, as to no testimony of the surrender being admissible but written record, no such requisite was prescribed by the statute; and it were strange if *parole* evidence could only be received in support of the prisoner's guilt, and not in vindication of his innocence.—*Lastly*, That trial by jury was the grand bulwark of our lives and liberties; and if, in any case, this mode is more specially requisite, it is in accusations of a direct offence committed against the crown. Anciently, attainders in absence were unknown, both in England and Scotland; but now, that the wisdom of the law had thought proper to introduce such at-

1754 tainders, various defences might yet be stated against awarding execution, especially where the attainder is not absolute, but conditional. By act 7th of Queen Anne, c. 21. the Scots treason-laws are totally abolished; and it is therein provided, that the Court of Justiciary, in cases of treason, shall proceed and determine in such manner as the Court of King's Bench may do by the laws of England: therefore, as it is not disputed that every defence, against awarding execution, proposed by the prisoner, before the Court of King's Bench, must be tried by jury, the like rule must be observed in the Court of Justiciary. This is made still clearer by act 22d George II. c. 48. which provides, that all defendants outlawed for high treason, or misprision of high treason, in Scotland, shall, *as near as can be, have such and the like methods, remedies, or advantages, for avoiding, falsifying, or reversing, such outlawry as may be had by the law and usage of England.*

The Lords found the act of attainder sufficiently instructed by the statute-book, and exemplification of the act produced in Court, and repelled the objections to its authenticity. They also repelled the objection of a misnomer of Macdonald for Macdonnell. With respect to the defence of a surrender, they ordained the prisoner to give in a more special *condescendence** of the time, place, and manner, of his submitting himself to justice; also, a list of the witnesses by whom he was to prove the same; and found 'no necessity of proceeding in this manner by a jury.'

Conform to this judgement, the prisoner gave in

* A state of facts.

a *condescendence* of facts relative to his surrender, 1754 as already stated, and a long list of witnesses by whom it was to be proved; and the crown lawyers disputed the relevancy of the *condescendence*, by repeating, at great length, the objections to the surrender which they had already set forth. The Court having considered the import of the *condescendence*, and heard the debates, found the prisoner's plea of surrender, as therein set forth, not relevant, nor sufficiently qualified in terms of the act of attainder, *repelled the defence founded upon it, and refused the prisoner any proof of the fact.*

An objection was then made by the prisoner's counsel to the whole witnesses cited for the prosecutor, as the executions of summons against them had been returned to the Clerk of Court only that morning. It was answered by the crown lawyers, that the witnesses summoned upon a more early citation had absconded; it therefore became necessary to call this additional list. The Court repelled the objection; but adjourned the trial till Friday next, that the prisoner might have opportunity to see the list, and propose any legal objections to the witnesses adduced.

The prisoner being again brought to the bar on the 22d of March, gave in a declaration to the Court equivalent to an acknowledgement of his identity. The prosecutor, however, thought proper to lead a proof by witnesses of his identity. This being done, the Court pronounced judgement upon the prisoner, finding, 'That the said Archibald Macdonald is the same person who stands attainted of high treason by the act of Parliament above mentioned, by the name and designation of Archibald Macdonald, son

1754 ' of Coll Macdonald of Barisdale; and, therefore, and
 ~~~~~ ' in respect thereof,' adjudging the prisoner to be  
 taken to the Grass-market of Edinburgh, on the 22d  
 May next, and hanged on a gibbet, to be cut down  
 alive, his entrails torn out and burnt, his head cut  
 off, his body quartered, and his head and quarters to  
 be at the King's disposal.\*

\* A petition of appeal to the House of Lords, against this sentence was drawn; but, while the prisoner's friends were adjusting some difficulty about the mode of presenting it, the necessity of a petition was superseded by a reprieve, and afterwards by a pardon. Since that, various petitions of appeal have been presented, particularly in the cases of Ogilvie, 1765, Mungo Campbell, 1770, Miller and Murdison, 1773; and, *lastly*, in the case of Bywater, A. D. 1781. And a solemn judgement of the House of Lords was pronounced, finding, that *no appeal lies from the Court of Justiciary to their Lordships*. The most mature consideration of this important subject that I am capable to bestow;—the laborious search that I have made into our criminal records from A. D. 1536 to the present times, have completely rivetted my opinion, that this judgement requires again to be considered,—that law and expediency both require it. While I am reluctantly obliged to deliver my sentiments, it affords me considerable satisfaction, that I am laid under no necessity of canvassing the arguments delivered on this topic before their Lordships, by the truly venerable Peer who presides in the Court of King's Bench. I have not to combat that noble Lord's opinion, but the report sent from this country to his Lordship, upon which, I apprehend, his opinion was founded. I did intend to publish an argument to show, ' *That an appeal lies from the Court of Justiciary to the House of Lords;*' but, as I am at this minute doubtful if I shall be able to accomplish my original purpose, of presenting my argument in the form of an Appendix to this work, I trouble the reader with this note, expressive of my zealous wish, that if, upon a future occasion, a prisoner shall be advised of a sentence pronounced by the Court of Justiciary, affecting his life or liberty, being *contrary to law*; I say, that the prisoner implore relief from the

This sentence, and the interlocutors preceding, 1754 appear contrary to law in three respects, as they refuse to sustain the prisoner's defence of a surrender, and to allow a proof of the same; as they only find that the prisoner was the identical person pointed out in the act of attainder, but do not also find that he did not surrender himself in terms of the act; and as they refuse to admit the prisoner to trial by jury.

*The judgements are illegal, as they refuse to sustain the prisoner's defence of a surrender.*

Penal laws are, in general, prohibitory regulations designed for the order and security of civil society, discharging the people at large from certain actions, such as theft, murder, and the like. In the case of actual or meditated rebellion, a conditional act of attainder is provided for the security of the state, by ordaining, that suspected individuals pointed out in the act, shall perform certain conditions therein prescribed. In the *first* of these, the law is *general*, and the crime consists in *perpetrating things prohibited*. In the *second*, the law is *special*, and the offence consists in *omitting things commanded*. If one of the public is brought to trial for transgressing the former of these laws, it is the most valid of all defences, that *he did not commit the deed prohibited*. If an individual pointed out in the latter part of these laws

House of Lords, by petition of appeal, craving their Lordships once more to admit this question to a solemn discussion; and to appoint a *complete and accurate report* to be laid before their Lordships, of the cases which have been brought from the Court of Justiciary, before the Scottish Privy Council, *his Majesty and the Estates of Parliament of Scotland*, and the British House of Lords, from A. D. 1641 to the present times.

Q

1754 is accused of not having done what was therein required, it is an equally valid defence, that *he did perform the condition prescribed*. Therefore, to doom a man to the scaffold on the former of these laws, who had not committed any theft, murder, or the like, is not more to *condemn without guilt*, than to consign to punishment, on the latter of these laws, one, who had absolved himself from the imputation of guilt, by surrendering his person, or performing the other conditions required.

*The sentence is illegal, or inefficacious, and null; as it only finds, that the prisoner was the identical person pointed out in the act of attainder, but does not also find that he did not surrender himself in terms of the act.*

The persons whose names were engrossed in the act of attainder could incur the *declared presumption* of guilt, could become criminal, and amenable to punishment, only *by not performing* the conditions of the act. Therefore, the Court, in finding an undoubted, indeed notorious truth, that the prisoner was the person described in the act, and sentencing him to death on that account, without also finding that he did not surrender, in terms of the statute, did condemn him to death without any statutory guilt upon the part of the prisoner, or any statutory authority upon the part of the Court. This may be further elucidated by observing, that, by changing the words, ‘Archibald Macdonald,’ into ‘Alexander ‘Earl of Kelly,’ the like judgement might with truth have been pronounced, viz. that his Lordship was the person described in the act of attainder, and the like sentence of death been therefore passed upon

that Lord, although he did publicly surrender him-<sup>1754</sup>self to Government, and consequently was never challenged on account of the act.

*The sentence is illegal, because the prisoner was denied the benefit of trial by jury.*

It has already been observed, that penal laws are for the most part *general and prohibitory*; but that, in the case of conditional acts of attainder, they are *special and mandatory*. If, then, the mode of trial by jury is the established law of a country, as that to which the life of a citizen can most safely be trusted, the same reason holds for adopting this mode, whether the prisoner be accused of *committing* what was *prohibited* by a general law, or *omitting* what was *required* by an act of attainder. Further, had the prisoner been brought to trial in England, he would, beyond dispute, have been entitled to have had his defences tried by jury: but, by statutes of Queen Anne, and of King George II. the treason laws of England are extended to this country, and the same mode of trial (as near as may be) is prescribed; consequently, the prisoner was equally entitled to trial by jury, when brought before the Court of Justiciary, as if he had been brought before the Court of King's Bench.

But it is by no means surprising, that the Court of Justiciary should have pronounced this judgement, refusing the prisoner a trial by jury, when we reflect upon the disposition which our courts of law have manifested to encroach upon, to annihilate this invaluable privilege. It appears that, by the old law of Scotland, trial by jury took place in matters both civil and criminal. Our civil judges have long since

1754 exalted their own dominion, by shaking themselves loose of the intervention of a jury; and I confess, in questions merely of property, I do not wish to see this mode of trial restored: for, so tedious are our forms of proceeding, that it would be impossible to decide matters of property by a jury, without effecting so great an innovation in our system of jurisprudence, as must be productive of inconveniencies and perplexities which could not be removed but in a long course of practice. Nor do I think there is danger in trusting questions of right between man and man, to the sole decision of our judges; for, besides that redress may be sued for to the Supreme Court of the nation, it can but rarely happen that partiality towards a party or a cause, will, in civil matters, influence any of their Lordships. But, in a criminal court, when judges are actuated by a laudable zeal for the checking of enormous crimes, for bringing an obnoxious criminal to justice, it is less safe to trust the life of a prisoner in the hands of judges appointed by the crown, than in those of a jury chosen promiscuously from the prisoner's equals. Much less in accusations of treason or others of direct offence, by a subject against the sovereign; for in such, I apprehend, it must necessarily happen, that judges will, for the most part, lean towards the crown.

On a late occasion, the Lords of Justiciary delivered a solemn opinion,\* that, in criminal actions be-

\* Records of Justiciary.—Procurator Fiscal of the City of Edinburgh against Young and Weemyss, 19th March, 1783. When this cause was argued before their Lordships, Ilay Campbell, the

fore inferior courts, in cases short of capital punishment, trial by jury is not requisite. But, unless <sup>1754</sup> their Lordships shall be disposed to pay more respect to this opinion than they sometimes do to precedent, we may entertain a rational hope, that, in future practice, they will alter their judgement. Before delivering their solemn opinions, their Lordships heard counsel on this point, whether the various degrees of corporal punishment, short of death, could be inflicted, but after trial by jury; and a report was, upon their order, made to them of the practice before the inferior judicatories, as well as the supreme tribunal of Justiciary. From the report made to them, it appears, that never were a set of judges, never a set of benches, more impartial, if an uniform discrepancy, and contradiction of practice, can be styled *impartiality*. The practice before the magistrates of royal boroughs, and that before the sheriffs, were diametrically repugnant to each other; and that

Solicitor-General, appeared as counsel for the prosecutor. He maintained, that the lesser trespasses, which were to be punished by fine and imprisonment, might be tried without jury, but did not plead that the severer punishments of pillory and banishment could be inflicted but after trial by jury. But their Lordships, in giving their opinion, said they were not bound to regard Mr. Solicitor's admissions. The Honourable Henry Erskine, who was counsel for Young and Weemyss, contended, that no corporal punishment whatever could take place but after trial by jury.—As the nature of the work lays me under the necessity of presuming to give my own opinion, I must observe, that it coincides entirely with the plea maintained by the Solicitor General, viz. That such offences as fall to be punished by fine and imprisonment may be tried without jury, but that crimes *which are to involve a deeper consequence* may not.

1754 of the Court of Justiciary fluctuated from the one side to the other like the ebbing and flowing of the tide.

By the report made of the practice before the magistrates of royal boroughs, in the trial of crimes not capital, it appeared, that, in the whole of these boroughs, *except one*, (the borough of Ayr,) the magistrates were in use to proceed without jury. The proceedings again, in the different counties, evinced, that, in all of them, *except one*, (the county of Edinburgh,) the sheriffs were *not* in use to inflict any corporal punishment without the verdict of a jury, imprisonment excepted. Upon these opposite modes of procedure, I must observe, that the magistrates of royal boroughs, in this country, cannot, in general, be supposed either to have studied the science of the law, or to have enjoyed the benefit of an academical education; and that, in many of the decayed boroughs, it cannot be presumed that the magistrates are men of liberal ideas, or independent sentiment and situation in life: that the sheriffs again must be chosen from the bar. Thus, this opposite practice in sheriffs and magistrates, justifies the proverb, that the greater the ignorance the greater the presumption.

It appeared from an examination into the records of Justiciary, that one Dow, and his accomplices, in 1739, had been tried before the justices of peace of Linlithgow, for breaking into the brew-house and cellars of Mr. Hope of Craigiehall, and stealing quantities of wine, brandy, and ale: that they *confessed their guilt*, and were sentenced by the justices to be imprisoned, whipt, burnt on the back, and banished the county. Dow brought this sentence under re-



view of the Court of Justiciary, alledging, that so severe a punishment could not be inflicted by any judge, unless the prisoner had been found guilty by the verdict of a jury; and the Court suspended the sentence, except as to the whipping. 1754

In A. D. 1747, Robert Drummond, printer, was prosecuted before the magistrates of Edinburgh, for a defamatory libel against a person of the highest rank.\* He admitted that the ballad libelled on was printed in his printing-house; but denied any knowledge that the blanks in it were meant to be filled up with those names and characters which the prosecutor applied to them. The magistrates ordained the ballad to be burnt, the prisoner to stand an hour on the pillory, and to be banished the city, and deprived of his freedom as a burgess, for a twelve-month.† Mr. Drummond brought the cause before the Court of Justiciary by *bill of suspension*.‡ He

\* His Royal Highness William Duke of Cumberland.

† The intelligent reader is requested to think, whether the most arbitrary judge in England, since the accession of the House of Hanover, would have dared to try such an offence without jury.

‡ There are two forms of *writs* by which causes may be brought from inferior judicatories under review of the Courts of Session or Justiciary. The one is by *bill of suspension*, which may be presented after a judgement of the inferior Court is passed, and the decree extracted; the other, by *bill of advocacy*, which may be presented to their Lordships any time between the party being served with a summons to appear before the inferior court, and the decree of that court being extracted. Both these writs pass the signet, and are signed by a writer to the signet: and, upon their being presented to one or more of their Lordships, they either *pass or refuse the bill*.

1754 maintained, that the prosecutor had filled up the blanks from his own conjecture, and that he, the prisoner, was altogether ignorant how they should be supplied: that, supposing him to be guilty, the sentence was unmeasurably harsh; and further, that, in a matter of such consequence, he was entitled to trial by jury. The Court *refused the bill without answers.*

In A. D. 1757, John Falconer was tried before the sheriff of Edinburgh for using of false keys, and stealing of victual. He was ordained to be kept in prison till payment of the expences of his prosecution, which amounted to £1 10s. and to be banished the county for life. He complained to the Court of Justiciary that he had been tried without jury, and they dismissed his complaint.

Alexander Flight was prosecuted before the bailies of Cupar, in June, 1767, for insulting the Provost, and was sentenced to a month's imprisonment, and banished from the town for three years: but their Lordships suspended the sentence as to the banishment.

An action was brought before the sheriff of Edinburgh, by John Simpson, copper-smith, against Leonardo Piscatorie, teacher of music, (A. D. 1771.) It charged the defender with firing a gun or pistol, loaded with small shot, at the prosecutor, and maiming him so severely as to render him unable, in future, to earn his bread: and it concluded for £500 of damages to the private prosecutor; and also, that the defender should be punished by pillory, whipping, or otherwise. Piscatorie claimed to be tried by jury; because the libel concluded for a corporal punishment. The sheriff refused his claim; upon

which the defender brought the cause before the 1754  
 Lords of Justiciary, who pronounced the follow-  
 ing judgement: 'Having considered the said bill  
 ' and answers, with the criminal complaint before  
 ' the sheriff, *find the libel referred to in the bill ought*  
 ' *to have been tried by a jury,*' &c.; and, therefore,  
 ordained the sheriff to dismiss the libel; but reserve  
 power to the pursuer to insist in a new indictment  
 according to law.

The author who last travelled over the gloomy  
 field of criminal prosecutions,\* bestows a hearty and  
 generous applause on this judgement. To me is left  
 the unpleasing *piece of duty* to acquaint the public,  
 that the next time this point was debated before their  
 Lordships, they pronounced a judgement considera-  
 bly different; and, soon after, they gave a solemn  
 opinion directly opposite. For Archibald Tait, over-  
 seer (*i. e.* bailiff) to the Earl of Roseberrie, being  
 convicted, in July, 1775, by the justices of peace of  
 Linlithgow, of embezzling oats, hay, and straw, be-  
 longing to the Earl, and *under the defender's trust*,  
 and being sentenced to be pilloried and banished the  
 county for life, brought this judgement under review  
 of the Lords of Justiciary. The following points  
 were argued before their Lordships, both in plead-  
 ings at the bar, and in printed informations, 1<sup>mo</sup>,  
 Whether justices of the peace had a jurisdiction to  
 try this crime? 2<sup>do</sup>, Whether they could proceed in  
 such trial without jury? And their Lordships, upon  
 advising the cause, suspended the sentence as to the  
 pillorying; but affirmed it in other respects.

\* MacLaurin's Criminal Cases, p. 723.

1754 In the case of the procurator-fiscal of Edinburgh against Young and Weemyss, when the preceding report was laid before their Lordships, the indictment concluded, 'That they ought not only to be punished in their persons, by *whipping, banishment, pillory, imprisonment, or otherwise*, as to the magistrates shall seem meet,' &c. but ought also to be fined in the sum of £50 Sterling each, payable to the complainer. Among other pleas which the defenders urged, why trial could not proceed against them, upon the libel raised before the magistrates, they maintained, that no sentence of corporal punishment could be pronounced, but after a verdict of a jury. The indictment was, in various respects, so illegal and absurd, that their Lordships would not sustain it: but they omitted not to express the special reasons why they ordained the magistrates to dismiss the libel. Lest an opinion should prevail, that trial by jury was necessary in prosecutions for a corporal punishment, each of their Lordships, in rotation, except Lord Gardenston, who was absent, delivered an opinion, that the lesser crimes could be tried, and the punishments of whipping, pillory, and banishment, inflicted, without trial by jury. It is not easy, however, for the mind to renounce, at once, doctrines which have long been respected, to *conquer prejudices* which have long been entertained. Of this the Court seems to afford a pregnant instance; for, on the same day, their Lordships gave judgement upon a bill of advocacy from the sheriff of Edinburgh, at the instance of one Ballentine, finding that the libel or complaint 'referred to in the bill of advocacy, which contains a charge of different acts of assaulting, wounding,

‘and maiming, whereby the persons therein named 1754  
 ‘were in danger of being murdered; and also charg-  
 ‘ing, that, in pursuance of these assaults, the de-  
 ‘fenders forcibly seized, and theftuously carried off,  
 ‘certain effects belonging to the persons assaulted,  
 ‘and concluding for punishment, by whipping, pillory,  
 ‘banishment, or otherwise, as to the judge shall seem  
 ‘meet, ought to have been tried by a jury.’

This judgement, however, in so far as it is opposite to the one immediately preceding, is, in my humble opinion, a distinction without a difference, or rather a manifest absurdity. This will be rendered the more apparent by stating the ground of this judgement, and the gradation of our criminal punishments.

#### *Ground of this Judgement.*

The ground upon which it proceeded was, that trespasses which are reckoned *inter leviora delicta*, may be tried without jury; but that the crimes which are reckoned *inter graviora delicta* cannot.

#### *Gradation of our Criminal Punishments.*

Imprisonment, whipping, pillory, and banishment, are almost the only corporal punishments in use with us, short of death. These, and pecuniary mulcts, are applied both to offenders who are guilty of the *leviora*, and the *graviora delicta*, according to the discretion of the judge.

To allot an exact gradation of punishment to the scale of guilt, even with the most accurate system of

1754 legislature, is perhaps impossible,—but to expect it from that *image* of jurisprudence which has been erected in the days of tyranny; from an image to which poetical fiction would attribute a leaden head, and hands of iron, is absurd. The tribunals of Fame, of Conscience, and of a Future State, may indeed apply a more exact dispensation of justice; but, if the punishment prescribed by law be the same, it is alike to the prisoner, as to *personal suffering*, whether he be convicted of a statutory trespass, or an atrocious crime. Therefore, in so far as personal safety is concerned, if there is to be any difference in the mode of trying crimes, the more solemn, the more guarded mode of trial, ought to be adopted, *rather in relation to the severity of punishment than to the atrocity of the crime*. But, in these bills of advocacy by Young and Weemyss from the magistrates, and by Ballentine from the sheriff, the degrees of guilt charged were different, the punishment concluded for was the same,\* the judgements of the Court of Justiciary were opposite; the distinction, therefore, which is made by these two judgements amounts precisely to this—*That a man may, without jury, be pilloried and banished for a peccadillo, but cannot, without jury, be pilloried or banished for an atrocious crime*.

The instances in which the Court affirmed or reversed the sentences of the inferior judicatories, inflicting corporal punishment without trial by jury,

\* Except that, in the libel against Young and Weemyss, there was, besides other punishments, a conclusion for a fine of £50 Sterling each, which was not in the libel against Ballentine.

have been just recapitulated: and, besides the case <sup>1754</sup> of Macdonald of Barisdale, the Court took upon <sup>w</sup> them, in another capital offence, to decide without jury. It was in the trial of John Caldwell for robbery.\* The plea of madness was urged in his defence; but, instead of remitting this plea, along with the indictment, to the cognisance of a jury, their Lordships were pleased to tear asunder the inseparable concomitants, *charge* and *exculpation*. The charge, viz. the accusation of robbery, and the proof thereof, they remitted to the knowledge of an assize; but the exculpation they themselves took previous trial of, examined witnesses upon the point, pronounced the madness affected, and then remitted the accusation of robbery to a jury.

After such violent and repeated blows at the right of trial by jury, I cannot help expressing my apprehension, that the Court has already sapped the foundation, and that, unless prevented by the aroused suspicion, by the jealous eye of their country, it only remains for judges who may be possessed of more courage, or more temerity, totally to overturn the fabric.

I cannot, without some farther remarks, dismiss this momentous subject in a country where the shades of superstition retreat before the light of science;—where the liberties of mankind have been established at a vast expence of blood and treasure;—liberties which, perhaps, totter on the axis, and which, like the twilight, may accompany in its fall the setting glory of Britain. It is the established law of this

\* Records of Justiciary, July 13, 1737.

1754 country, that no prisoner can be tried before the whole Lords of Justiciary without jury. Is it not then contrary to all reason, that each magistrate of royal boroughs, many of which do not contain a single inhabitant possessed of wealth, of science, or of independence, shall enjoy a power which the law has denied to the collective body of the supreme judges of the nation? Shall it be said, that, because it is only the lower class of mankind which are commonly tried for petty crimes, that their liberties are not worth protecting? Or, will it be alledged, that scourging, pillory, and banishment, are not terrible punishments? Besides, the mean ideas of those *self-elected* men, who, in the decayed boroughs, fill the offices of magistracy, may often lead them to pass over heinous crimes, and to punish the lesser offences with unmeasurable rigour. In the month of September, 1784, one of the baillies of Edinburgh sentenced a woman, whom he had convicted of selling butter short of weight, to stand on the pillory, with a label on her forehead denoting her offence, on a market day, at nine in the morning, an hour when the streets swarm with labourers and apprentices, dismissed from their work to breakfast. No formality of a jury had been used; the baillie had not so much as consulted the city's assessors, whose opinion it was his duty to have taken even in every civil case of the smallest difficulty or importance. What was the consequence? The rabble, in their rage at being cheated of an ounce of butter, attacked the unhappy woman with such fury, that, had she not been immediately taken from the pillory, they would have murdered her. *Yet the mob*, so enraged at a culprit



for cheating in a few ounces of butter, in the month 1754 of June preceding, burnt a distillery worth £7000, and would have done infinitely more mischief, had they not been prevented by the repeated interposition of a military force: *yet the magistrates*, equally rigorous and informal in punishing the fraud of a silly woman, and dastardly in permitting the outrages of a vile rabble, suffered, without the smallest interruption, a puny mob to beat a drum through the principal streets of the city, nay, before the very door of the city-guard, for the professed purposes of tumult and conflagration.

These opinions, this practice of the Scottish judges, become the more alarming, when we behold the legislative body of the nation introducing a mode of trying offenders distinct from that of jury. In the southern part of the united kingdoms, civil liberty has, for a long period of years, been more respected than in Scotland. An author who has simplified the complex and cumbersome mass of English jurisprudence, whose *writings* have acquired the applause of his countrymen, not only as delivering a clear and comprehensive system of law, but as breathing a generous spirit of liberty, expresses himself with a noble ardour in favour of trial by jury.\* He says,—  
 ‘ It is the most transcendant privilege which any  
 ‘ subject can enjoy, or wish for, that he cannot be  
 ‘ affected either in his property, his liberty, or his  
 ‘ person, but by the unanimous consent of twelve of  
 ‘ his neighbours and equals; a constitution that I may  
 ‘ venture to affirm has, under Providence, secured

\* Blackstone’s Commentaries, vol. III. p. 379.

1754 ‘ the just liberties of this nation for a long succession of ages; and, therefore, a celebrated French writer, who concludes, that, because Rome, Sparta, and Carthage, have lost their liberties, therefore those of England, in time, must perish, should have recollected, *that Rome, Sparta, and Carthage, at the time when their liberties were lost, were strangers to the trial by jury.*’ And again, ‘ The liberties of England \* *cannot but subsist so long as this palladium remains sacred and inviolate, not only from all open attacks (which none will be so hardy as to make), but also from all secret machinations which may sap and undermine it, by introducing new and arbitrary methods of trial,*’ &c. &c. I submit whether it may not excite a just alarm to see a statute, enacting ‘ new and arbitrary methods’ of trying the delinquents of the East.† I submit whether this may not be one of those ‘ *secret machinations which may sap and undermine trial by jury.*’

\* Blackstone’s Commentaries, vol. IV. p. 343.

† Act for the better regulation and management of the affairs of the East India Company, George III. An. 24. c.

## OF LEASING-MAKING.

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*Trial of Mr. John Stewart, Commissary of Dunkeld, son to Mr. James Stewart of Ladywell, for Leasing-Making against the Earl of Argyle, and fabricating and uttering lies and calumnies contrary to law.*

**LEASING-MAKING** was a statutory crime, the invention of tyranny. It meant originally, 'the making, or uttering of lies, tending to breed discord between the King and his people.' So early as the reign of James I. of Scotland, it inferred a capital punishment, and the offence was the same, whether the calumnies were uttered of the King to his people, or of the people to their King. In succeeding reigns new meshes were added to this snare for life and liberty. Every one who *misconstrued* the King's proceedings, or who failed to inform upon those guilty of leasing-making,\* were caught within the net. And it was not till after the death of King William, that the penalty of transgressing these laws was restricted to an arbitrary punishment.

In the year 1641, the Earl of Argyle, with concurrence of his Majesty's Advocate, brought a criminal indictment against the prisoner for leasing-making,

\* Statute-law abridged, *in voce* Leasing-making.

1641 committed by the inventing and uttering of calumnious reports, charging that noble Lord with slanderous speeches and disloyal pursuits.

The origin of this trial is thus described by a contemporary writer of good authority.\* One Graham, a minister, was challenged before the Committee of Parliament, which met on the 26th of May, 1641, for uttering speeches defamatory of the Earl of Argyle. On being challenged, he named as his informer another minister of the name of Murray. Murray declared that he had the report from the Earl of Montrose. Montrose acknowledged it; declared the report to be, ‘ that the Earl of Argyle had got some young lawyers, and others, in his name, to present bonds to sundry classes of men, obliging themselves to follow the Earl of Argyle as their leader, without any reservation of the King or of the state; and that the Earl of Argyle had said, that the Parliament, at their last meeting, had consulted lawyers and divines about deposing the King; that they had intended to have done it at the last session of Parliament, and would do it on the next.’ The indictment added, that the prisoner had sent an account of the whole to Lord Traquair, to be laid before the King. Montrose declared, that Lord Argyle made those speeches in his own tent at the Ford of Lyon, in presence of the Earl of Athole, and eight gentlemen, whom he had made prisoners: that one of these gentlemen was the prisoner, Stewart, and he offered to produce him as his authority.

Immediately on this declaration, Montrose, dread-

\* Guthrie’s Memoirs, p. 79.

ing that the prisoner might be tampered with to retract what he had said, to exculpate Argyle, and leave Montrose in the lurch, sent some gentlemen for him. They brought him to Edinburgh on the 30th of May, and next morning he appeared before the Committee of Estates, and subscribed a declaration, asserting all that Montrose had affirmed in his name. Argyle, with many oaths, and much passion, denied the whole; and the prisoner was committed to custody in Edinburgh castle. 1641

In a few days, Lord Balmerino, and Lord Dury, one of the Lords of Session, were deputed by the Committee to examine the prisoner; and, whatever may have passed at this examination, the prisoner next day wrote a letter to Argyle, exculpating him from the slanderous speeches alledged to have been made at the Ford of Lyon, acknowledging the whole to have been a malicious fabrication of his, the prisoner's, and declaring further, that, by advice of Montrose, Lord Napier, and others, he had transmitted an account of it to the King. And to this he adhered, in a declaration before the Committee of Estates. On the 11th of June, Montrose, Napier, &c. were imprisoned in Edinburgh castle, and, on the 21st of July, the prisoner, at the instance of the Earl of Argyle, was tried for his life.

Argyle's counsel produced in Court an order of Parliament requiring the Justices to proceed in the trial,\* notwithstanding it was contrary to form for the Court to sit during the meeting of Parliament. They produced also a commission from Parliament,

\* Records of Justiciary, July 21, 1641.

1641 appointing Lord Elphinstone, the Laird of Aithernie, John Semple, and Sir James Learmonth of Balconie, assessors to the Justices.

The indictment charged the prisoner with the slanderous speeches against Argyle, mentioned above. It also set forth, that for these offences he had been already called before a Committee of Parliament, and had not only acknowledged his having expressed these calumnies both by word and writing, but also that they were false and groundless inventions contrived by himself: that the Committee had thereupon pronounced a decree, declaring these speeches to be false and scandalous: that the prisoner was author of them: that he had thereby committed the crime of leasing-making; and, therefore, the Committee remitted him to the Justice Court to be punished accordingly.

The first plea which the prisoner urged was, 'that the crime of leasing-making consisted in defaming the King, not in slandering the subject;' but this, like his other defences, was false, or frivolous, for the tyrannical statutes extend it to both cases. He pleaded, *2dly*, That it behoved the King's Advocate to have a special warrant from his Majesty, before he could grant his concurrence to a prosecution raised by an individual on account of his private injuries—a position altogether repugnant to law and practice. And, *lastly*, he alledged, That it was not the Committee, but the Parliament, that had power to pronounce a decree, an argument altogether frivolous, seeing that the Justice Court were competent to pronounce a judgement in the case, although no guilt had been found, either by Committee, or by Parlia-

ment. The prisoner was much more decisive in the 1641 steps he took against himself. He repeated before the jury his former confession; and he humbly implored the Earl of Argyle's pardon, and offered to make every acknowledgement.

The jury found the libel proved, and the Court sentenced him to be beheaded at the Cross of Edinburgh on the 28th of that month, and the sentence was executed accordingly.

As the prisoner's arguments during the trial were frivolous, so his behaviour between the sentence and its execution betrayed great irresolution. It was alleged that he had been induced to take the guilt upon himself, upon promise of indemnity,\* in order to screen Argyle from the odious imputation in the speech which Montrose had repeated before the Committee of Estates: that Sir Thomas Hope advised Argyle, that, if the prisoner was screened from punishment, the world would believe he had been bribed to retract his declaration before the Parliament; and, therefore, the prisoner's life was a sacrifice requisite to Argyle's vindication; and that the prisoner underwent the most violent conflict of passions; upon finding, that, by his own false testimony, he had been outwitted of his life. Be this as it may, it certainly shocks us to find a person who took such an active part in the civil wars of Charles I. which terminated in the murder of the King, and overthrow of the state, prosecuting unto death a man for reporting traiterous speeches of him; and it ought no less to warn us against the establishing or counte-

\* Guthrie's *Memoirs*, p. 80.

1641 nancing iniquitous precedent, since we little know how soon it may be converted into an engine for our own destruction. For the son of this very prosecutor fell by an iniquitous sentence on this very charge of *leasing-making*.\*

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*John Niven, Captain of the Ship Fortune of London,  
for Leasing-making against James Duke of Albany  
and York.*

1680 THE prisoner was served with a criminal indictment at the instance of his Majesty's Advocate, setting forth, that, by the statutory law, and the practice of this realm, *leasing-making*, the engendering of discord between the King and his people, and the uttering slanderous speeches to the disturbance of government, are crimes of a capital nature, yet the prisoner had been guilty of them,† by railing against the Duke of Albany and York, the King's brother; by charging him with being in a plot to take the King's life; with combining with the French King to invade England; and with coming to Scotland on purpose to make a party to introduce Popery. Frivolous objections to the relevancy of the in-

\* In the state trials, there are three prosecutions to be found for this statutory crime. Those of Lord Ochiltree, Lord Balmerino, and the Marquis of Argyle.

† Records of Justiciary, July 15, 1680.



dictment were urged for the prisoner, and repelled 1680  
by the Court.†

William Eccles, writer in Edinburgh, deposed, that, being in Dysart on the day libelled, in company with the prisoner, and some others, the prisoner inquired at the deponent, and the rest of the company, what stile of reception the Duke of York had met in Scotland? To this the deponent answered, ‘ he ‘ had been received according to his great quality and ‘ merit, *and that he was a fine Prince;*’ and the prisoner replied, there was not one of ten thousand in England who would say so. He added, that the Duke of York was in a plot to take the King’s life, and had combined with the French King to invade England; but the deponent cannot say whether the prisoner expressed these words as his own opinion, or that of the people of England. The prisoner at the same time said, no man had a greater regard than him for the Duke; that, under his Royal Highness’s conduct, he had lost part of his blood in his Majesty’s cause; and that he would be ready to hazard his life in the Duke’s service.

† A very unjust account of this trial is given by Lord Fountainhall, in his Decisions, vol. I. p. 108. The prisoner indisputably fell within the tyrannical statutes against leasing making, and there seems to have been no doubt of his having been guilty of the fact. Fountainhall is deemed a writer of authority. He was upon the side of law and liberty; but any one who is conversant in the affairs of that period, and who compares the result of his knowledge with the cases in Fountainhall, must be sensible of the extreme partiality of that writer; a propensity which, in times such as those, it was very difficult to resist. His partiality is the less surprising, as he appears not to have been untinted with fanaticism; and those who have occasion to compare *his Journals* with the original Records of Justiciary, will see little reason to compliment him upon his accuracy.

1680 The prisoner objected to William Tarbett, a waiter, being received as a witness; but his objections were repelled. Tarbett deposed, that he was accidentally in Burntisland, in the house of Captain Seaton, where he fell in company with the prisoner, and two Englishmen, a shipmaster and his mate, and frequently overheard discourses between them relating to government; and heard the prisoner say, that the Duke had come into Scotland to make a party for introducing Popery, 'but our good old English hearts would not suffer that.'

Michael Seaton, against whom also the prisoner urged objections which were over-ruled, deposed, that, in his own house in Burntisland, upon a Sunday in April last, he was sent for into the room where the prisoner, two English seamen, and William Tarbett, were drinking. He heard Niven and the other Englishmen speaking *extravagant commonwealth language*, and particularly concerning the Duke of York. He could not be positive that the words were those charged in the indictment, viz. that he had come to make a party to introduce Popery, but thinks they were to that purpose.

The jury, by a *plurality of voices*, found the prisoner *guilty of leasing-making against the Duke of York*.

On the 4th of August, the Court sentenced the prisoner to be hanged at the Cross of Edinburgh on the 18th; but, on the 6th of that month, the Court, in consequence of an act of Privy Council, proceeding upon a letter from the King, suspended the execution till his Majesty's further pleasure should be declared; and it does not appear that the sentence ever was executed.

## OF PARRICIDE.

*John Dickson, for the Murder of his Father.*

THE prisoner, who was son and heir to John Dick- 1591  
son of Bellchester, on the 30th of April, 1591, was  
tried for the murder of his father, committed in the  
month of July, 1588. The criminal record\* con-  
tains neither the particulars of the murder, nor the  
evidence against the prisoner, but only that he was  
convicted by a jury, and sentenced to be broke up-  
on the wheel at the Cross of Edinburgh. At this  
period, and long after, the sentences of the Court of  
Justiciary frequently express no time for their being  
carried into execution; it being customary to take  
the convict directly from the Court to the scaf-  
fold.

\* Records of Justiciary, April 30, 1591. Philip Stansfield  
was tried for the murder of his father, Sir James Stansfield, 1688.  
See Salmon's State Trials, p. 610.

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## OF MURDER.

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*Thomas Armstrong, for the Murder of Sir John Carmichael of that Ilk, Warden of the West Marches.*

1601 **THE** uncertain and fluctuating limits of two neighbouring nations, which were always jealous of each other, and often hostile, afforded ample field for the depredations of robbers. We find, accordingly, the Scottish borders infested by clans of banditti, who transmitted their predatory pursuits from father to son, like a common profession. The minute and troublesome regulations established by the warden of the English marches, appointing a relief of sentinels, at every pass, by night and day,\* within a large district, evince, that the confines of England were no less infested with thieves and robbers.

Their depredations were carried on upon so extensive a scale, and exercised by such numerous bands, as enabled their leaders to live in power and affluence; and sometimes required the whole executive force of the state to crush those robbers. From a statutory prohibition† against persons bringing Scot-

\* Bishop of Carlisle's Border Laws, p. 147, *et seq.*

† James VI. Parl. 11th, chap. 101.

*tish or English thieves in their company to his Majesty's Court*, or to the city of Edinburgh, it appears, that as little discredit had attended their profession, as if they had been plunderers of the East. In the reign of James V. their robberies had arisen to so daring a height, that the King, with a military force of about 8,000 men, pitched his camp on the banks of the river Esk, in order to check these depredations.\* Even this mighty force was not thought sufficient, without the aid of stratagem, nay of fraud, to the apprehending of those robbers, whose extirpation could alone restore peace to the borders. *Johnnie Armstrang*, the captain of this lawless band, kept his residence at Gilnockie,† on the river Esk, between Langholm and Carlisle, where he lived the terror of the neighbourhood: and the English borders, for many miles, paid him tribute. Being seduced by the spies of the Court, on the pledge of public faith, he appeared before the King, attended by fifty horsemen, who had laid aside their hostile armour for the splendid array of a tournament. They were thrown into prison; forty-seven of them finished a life of rapine and bloodshed upon growing trees; and one of them atoned for his signal cruelties in the flames.— Thus, by one act, public faith was broken, and public peace was restored.

In the minority of Queen Mary, and of her son,

\* *Buchanani opera Ruddimanni*, v. I. p. 272.; *Leslie de Reb. Gest. Scot. Romae*, 1578, p. 432.; *Ballad of Johnnie Armstrang*, *Scottish Songs*, Edin. 1776, v. I. p. 13.

† The ruins of Gilnockie are still to be seen about three miles south of Langholm; the lands are now the property of the Duke of Buccleugh.

1601 and amidst the convulsions of the Reformation, the weeds which had taken such deep root in the borders, and which James V. had endeavoured to eradicate, must necessarily have sprung up afresh. When Queen Mary held a Justice-eyre at Jedburgh,\* the ravages of a troop of banditti in Liddisdale made it requisite for her to dispatch the Earl of Bothwell, with a military force, to suppress these disorders. The robbers gave the Earl battle, wounded him dangerously, and repulsed his followers: and the attention which the Queen showed him upon this occasion, excited the jealousy of her husband, and attracted the obloquy of her people.

Thomas Armstrong, the prisoner, was tried before the Court of Justiciary, at Edinburgh, on the 14th of November, 1601, for the murder of Sir John Carmichael of *that Ilk*,† warden of the west marches. In the indictment which was raised against him by Thomas Carmichael of Eddrem, the prosecutor, brother to the deceased, it was set forth, that the prisoner, his father, and many border-thieves and traitors, had assembled, of a Sunday, in the month of June, 1600, *for the purpose of playing at foot-ball*. That, being informed Sir John Carmichael was to hold a Court next day at Lochmaben, they devised his murder. Accordingly, the prisoner, and twenty accomplices, all completely armed, way-laid the deceased next morning, and murdered him as he was going to the Court, by shooting him through the body.

\* Buchanani, op. vol. I. p. 348.; Scott's Hist. of Scotland, p. 304.

† Rec. of Just. 14th Nov. 1601.

The prisoner being convicted by a jury, was sentenced to be taken to the Cross of Edinburgh; his right hand to be struck from his arm, then to be hanged on a gibbet till he be dead, and his body to be taken to the gallows on the Borough-muir, and hung in iron chains. This is the first instance I know of in Scotland, of the body of a malefactor being hung in chains. *Adie Scot*,\* one of the prisoner's accomplices, was at the same time condemned to be hanged.

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*Alister Macgregor of Glenstra, Laird of Macgregor, for Slaughtering the Laird of Luss's Friends, and plundering his Lands.†*

THIS trial, and the subsequent proceedings, relating to the clan Gregor, afford the most characteristic evidence of the barbarous state of the Highlands in those times, of the lawless manners of the people, and despicable imbecility of the executive arm.

The crimes with which the prisoner was charged, resemble more the outrage and desolation of war, than the guilt of a felon. He was accused of having

\* There was hanged along with the famous *Johnnie Armstrong*, one of his accomplices, *Adam Scot of Tushielaw*, commonly called *King of the Borders*.

† Rec. of Just. 20th January, 1604; Faculty MSS. vol. I. p. 214, 215, 369, 503.; Cockburne's MSS. p. 78, 346.

1604 conspired the destruction of the name of Colquhoun, its friends and allies, and the plunder of the lands of Luss: of having, on the 7th of February preceding, invaded the lands of Sir Alexander Colquhoun of Luss, with a body of 400 men, composed partly of his own clan, and of the clan Cameron, and of lawless thieves and robbers, equipped in arms, and drawn up on the *field of Lennox*, in battle array: of having fought with Sir Alexander, who, being authorised by a warrant from the Privy Council, had convoked his friends and followers to resist this lawless host; of having killed about 140 of Sir Alexander's men,\* most of them in cold blood after they were made prisoners: of having carried off 80 horses, 600 cows, and 800 sheep; and of burning houses, corn-yards, &c.†

A jury of landed gentlemen of most respectable family sat upon the prisoner. They were, Sir Tho-

\* There is mentioned among the slain, *Tobias Smollet*, baillie of Dumbarton, who must have been of the family of his namesake the celebrated author.

† This was not the first time that the Laird of Luss had suffered from the barbarous depredations of the Macgregors. It appears, that, when the King was at Stirling, on the 21st of December, 1602, the Laird of Luss presented himself before his Majesty, and implored his assistance. The Laird was attended by a number of women, corresponding to that of his followers who had been killed or wounded, each displaying as a banner, one of the bloody shirts which his men had on, when killed or wounded by the Macgregors. This was about six weeks before the engagement on the *Field of Lennox*. Letter by *Thomas Fal-lusdail*, burgess of Dumbarton, dated 19th December, 1602, and addressed to the Right Honourable Alexander Colquhoun of Luss, in the archives of that family,



mas Stewart of Gairntullie, Colin Campbell of Glen- 1604  
 urchie, Alexander Menzies of Weyme, Robert Ro-  
 bertson of Strowan, John Napier *fiar* of Merchistone,  
*Thomas Fallusdaill, burgess of Dumbarton*, John Her-  
 ing of Lethendie, William Stewart, captain of Dum-  
 barton, Harie Drummond of Blair, Charles Blair of  
 that Ilk, elder, chancellor of the jury, John Blair  
 younger of that Ilk, John Graham of Knockdonaine,  
 Moyses Wallace, burgess of Edinburgh, Sir Robert  
 Crichton of Cluny,\* Robert Robertson of Faskallie.  
 One of these persons, indeed, *Thomas Fallusdaill,*  
*burgess of Dumbarton*, ought to have been kept far  
 aloof from this jury. He was the special confident  
 and adviser of the Laird of Luss; and it was in con-  
 sequence of his suggestion that the Laird made the  
 parade before his Majesty, at Stirling, with the  
 bloody shirts, stained with the gore of his followers.  
 The jury unanimously convicted the prisoner, who,  
 in consequence of the verdict, was condemned to be  
 hanged and quartered at the Cross of Edinburgh, his  
 limbs to be stuck up in the chief towns, and his whole  
 estate, heritable and moveable,† to be forfeited.  
 Four of the Laird of Macgregor's followers, who  
 stood trial along with him, were convicted and con-  
 demned to the same punishment, eleven on the 17th  
 of February, and six on the 1st of March; and many  
 pages of the criminal record are engrossed with the  
 trials of the Macgregors. It became the object of na-  
 tional attention to break this lawless confederacy, of

\* The *Admirable Crichton* was of this family, and, as he was  
 born A. D. 1551, this gentleman probably was his brother.

† Real and personal.

1604 which the object was pointed revenge and indiscriminate plunder, supported by uniform contempt of the laws, and resistance to the magistrates. A statute was passed in the year 1633.† ordaining, that the whole of the Clan Macgregor which should be within the realm on the 15th of March thereafter, should appear before the Privy Council, and give surety for their good behaviour: that each of the clan, on arriving at the sixteenth year of his age, should appear before the Privy Council on the 24th of July, and find surety as above required: that the surname of Macgregor should be abolished, and the individuals adopt some other: that no minister should baptize a child, or clerk or notary subscribe a bond, or other security, under the name of Macgregor, under pain of deprivation.

This act was rescinded at the restoration: but it seems probable that the Macgregors had aggravated the outrages of a disorderly life by the unpardonable crime of Jacobitism. The act rescissory was annulled, and that against the Macgregors revived, in the first Parliament of William and Mary. Within these few years; however, the state of manners and of government rendered it proper that this act of proscription should be abolished for ever. The Highlanders, about the same period, were gratified in certain other trifles for entering with zeal into the service of the state when others conspired its ruin. Finally, the forfeited estates were restored to the

† Charles I. Parl. 1.; Act 30. Charles II. Parl. 1. Sess. 1.; Unprinted Acts, William and Mary, Parl. 1. Sess. 4.; Act 39. George III. An.

heirs of the persons who were attainted for being concerned in the rebellion 1745; a measure which would have been still more generally grateful, could government have bestowed a like degree of favour on the representatives of those noble families, the descendants of those illustrious ancestors, who undoubtedly were much more innocent, much more excusable, in being concerned in the rebellion 1715.

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*Patrick Roy Macgregor, for Theft, Sorning,\* wilful Fire-Raising, Robbery, and Murder.*

IT necessarily resulted from the proscriptive law mentioned in the former trial, and enforced with severe penalties, that such of the clan Gregor as did not yield obedience, became outlaws; became a desperate banditti, who had no other livelihood than the booty acquired by the most criminal outrages. The profligate and rapacious habits increased by this act survived the statute itself, and gave occasion to the trial of the prisoner.

Patrick Roy Macgregor, by his activity, courage, and cruelty, had rendered himself the most celebrated of a formidable band of robbers, that long infested the Highlands.† It consisted of about forty per-

\* *Sorning* was a very common crime in the uncivilized parts of the Highlands, and well known in our criminal law. It consisted in exacting free quarters by force.

† Faculty MSS. vol. I. p. 499, 503. vol. II. p. 222, 325. 18th January, 1666, 25th March, 1667.

1667 sons, whose stile of life had nourished a strength and activity of body, and a cruelty of disposition, displayed in wanton outrages against the feeling of others, yet accompanied with a fortitude that bore, without shrinking, the pinching of cold and hunger, and the torture of the executioner. Lachlan Macintosh, the captain of this band, about a year preceding, had finished his course in the hands of justice. The prisoner, who succeeded to the command, was a man of robust make, but diminutive stature. The red hair which grew thick over all his body, indicated his strength, while it added to his ugliness, and got him the name of *Roy*. His stern features bespoke ferocity; his keen red eyes, and nose, like the eagle's beak, heightened the terrors of his countenance. And both at his examination and execution, he bore an uncommon severity of torture, with a patience and fortitude which excited astonishment.

This banditti had committed violent depredations on the lands of John Lyon of Muiresk, for which Mackintosh, the captain, had been apprehended and executed, and the prisoner declared an outlaw; and a *commission of fire and sword* issued out against him. In resentment of these proceedings, the prisoner and his associates plundered the lands of Bellchirries, the property of Lyon of Muiresk. Lyon defended his house of Bellchirries, against the assaults of these robbers, till the 30th of April, 1666, when they surrounded the house, brought straw and corn from the barn-yard, piled them around the mansion, and set the whole in flames. The proprietor and his son, a lad of about eighteen years of age, were glad to

come out of the house, on a capitulation with the 1667 robbers, who promised them their lives. Having got possession of the house, the robbers carried off the furniture and arms, horses and cattle, belonging to Mr. Lyon, to the hills of Abernethie, about sixteen miles distant. They also carried the gentleman and his son prisoners; and, regardless of the articles of capitulation, murdered both father and son, leaving their bodies in a field, pierced with redoubled wounds.

The prisoner and his banditti, to the number of forty, proceeded next to assault the borough of Keith, levied contributions on the town, and fought with all who opposed them. In this assault, however, *Roy* was so severely wounded as to be unable to make his escape. Next day he was apprehended, and was conducted, under a strong guard, to the tolbooth of Edinburgh.

On the 25th of March he was brought to trial; and a complete proof being led of his manifold crimes, he was sentenced to be taken, on the 27th of that month, to the Cross of Edinburgh, his right hand to be cut off, and then to be hanged till he be dead, and his body to be hung in chains on the gallows between Leith and Edinburgh. The executioner mangled him so shockingly, in the discharge of his duty, that he was next day turned out of office. Patrick Drummond, the associate of the prisoner's guilt, was, at the same time, the companion of his sufferings.

*Agnes Johnston, for the Murder of — Lamb, a Child.*

1674 *W* AGNES JOHNSTON was prosecuted by Sir John Nisbet of Dirleton, Lord Advocate, for the murder of — Lamb, daughter of John Lamb in Airth,\* and grand-niece to the prisoner. It was charged in the indictment, that, about three months preceding, the prisoner, who lived with the parents of the deceased, took an opportunity, when there was nobody in the house but herself and the child, to take the infant, who was about eight months old, out of its cradle, lay it in a bed, and cut its throat.

The Lord Advocate produced against the prisoner her own confession, emitted before the Lords of Justiciary on the 6th of January preceding. She confessed she killed the child about forty days before. She declared, that the parents had given her no provocation; but that, several times before she committed the murder, *there was a spirit within her that did draw her neck together*. When she was in these fits, it was sometimes alledged that she did but feign sickness; on which account the people threatened to turn her out of the house, and, in resentment thereof, she cut the child's throat: that, before committing the murder, *the spirit had frequently tempted her to make away with herself*. In particular, she once attempted to drown herself in a well at


\* Records of Justiciary, 19th February, 1674.

Clackmannan; but there being little water in it, she 1674  
cried to a servant of the Laird of Clackmannan's, who helped her out. She declared, that she did not tell any body of her being thus tempted, *nor had she power to tell*; that she began to be troubled with the spirit about Fastren's-even preceding; that she was unmarried, and about fifty years of age. She adhered to this confession before the Court and jury.

The jury, after *reasoning and voting*, found the prisoner guilty. She was sentenced to be hanged in the Grass-market on the 21st of February, that is, after an interval of one day; and her moveable goods to be forfeited.

The conviction of this poor woman was an act of great inhumanity and injustice. The Court ought to have appointed counsel for her; the judges ought themselves to have been her counsel. As the only proof adduced against her was her own confession, it must be held to be true in all its parts; and, by the confession, it is obvious that the woman was greatly disordered in mind. She had been troubled with hysterical convulsions, which are often accompanied with deep melancholy, and this she called *the spirit*. And, in her, the melancholy was so great as to deprive her of the use of her judgement; which is plain from her having, without any other motive, been frequently inclined, and once having actually attempted to put herself to death. It was not her crime to have killed the child; it was her misfortune to have lost her judgement.

*Andrew Rutherfoord of Townhead, for the Murder of James Douglass, brother to Sir William Douglass of Cavers.*

1674 THE prisoner was accused of having conceived  deadly malice against the deceased: that, having dined together in a farmer's house on the 9th of July preceding, in company with several gentlemen, the prisoner, urged by this malevolent passion, on their way home from dinner,\* within half a mile of the town of Jedburgh, did murder the deceased, by giving him a mortal wound with a small sword through the arm, and through the body under the right pap, of which wounds he died within four hours: that the prisoner immediately fled to England, and would have embarked at South Shiells for Holland, had he not been apprehended. The prisoner pleaded self-defence.

Robert Scott of Horslehill deposed, That, about ten at night of the 9th of July, the deponent, Charles Ker of Abbotrule, William Ker of Newtown, and their servants, the prisoner, and the deceased, after dining at Swanside, called in the evening at the house of John Ker at Berchope, in their way to Jedburgh. The deceased was riding a little way before the deponent; and the prisoner, who was at a distance behind, galloped up beyond the deponent to the deceased. They rode a little way together, then alight-

\* Records of Justiciary, 6th and 10th November, 1674.



ed and drew their swords. The deponent knew not 1674  
which of them drew first; but, on galloping up, he  
saw them pushing at each other, and called to them  
to desist; but, before he could alight, they were in  
each other's arms. The witness asked, if there was  
any hurt done? to which the prisoner answered, none  
that he knew of; but, at the same time the deceased  
held out his right hand, and said, that he had got  
blood. The witness demanded their swords, which  
they immediately delivered to him: instantly there-  
after the deceased sunk down, and the prisoner fled.  
A surgeon was sent for from Jedburgh, they being  
but a quarter of a mile from the town. By his or-  
der, the deceased was put on a horse, a man sitting  
behind, and one walking on each side. When they  
arrived at Jedburgh, the deceased was laid on a bed,  
the surgeon probed the wound in his arm, and also  
that in his breast behind the right pap. The deceas-  
ed died within two hours after receiving the wounds.  
Both in the field, and when laid in bed, the deceased  
exclaimed, 'Fie! fie! that I should be affronted by  
'such a base man!' The witness did not hear the  
deceased say he was wounded before he drew; as  
little did he hear him urge any thing before his death  
in vindication of the prisoner. The witness return-  
ed the prisoner his sword. All the company had  
drank freely.

The surgeon deposed, that he thought the wound  
in the breast slight, and that the deceased died of the  
wound five inches long in his arm, an artery being  
pricked. Three witnesses were adduced for the pri-  
soner, who deposed *nihil novit in causa*. A woman  
was then cited on his behalf, but the King's Advo-

1674 cate objected to a woman being admitted a witness; and the Court refused to receive her, as there was 'no *penuria testium tempore mortis*.'\*

The jury returned their verdict on the 12th of November, unanimously finding the prisoner guilty; and, on the 16th, the Court passed sentence of death upon him, ordaining him to be beheaded on the 25th, at the Cross of Edinburgh.

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*George Clerk and John Ramsay, for the Murder of John Anderson, Merchant in Edinburgh.*

1676 JOHN RAMSAY, servant to the deceased John Anderson, and George Clerk, late servant to Mr. John Clerk of Pennycuik, were prosecuted for the murder of John Anderson, merchant in Edinburgh, at the instance of Mr. John Clerk of Pennycuik, and James Clerk, merchant in Edinburgh, nephews to the deceased, and of Sir John Nisbet of Dirleton, his Majesty's Advocate.

The indictment sets forth, that the prisoners lived in the house with the deceased,† and waited on him at the time of his death, and for some months pre-

\* No scarcity of witnesses at the time the deceased expired.—This offspring of ignorance and barbarism, the refusing to admit women as witnesses, unless none other were to be had, was a rule of the law of Scotland previous to this century.

† Records of Justiciary, January 17, 1676.

ceding. The deceased was an unmarried person, 1676  
and had nobody living in the house with him but  
the prisoners, who perfidiously abused the trust re-  
posed in them. When their master was counting  
his money, having the room door shut upon him,  
they were in use to rap at the door, and, when he  
opened it, they slipped in and stole part of his mo-  
ney. The season was very sickly: a flux, in particu-  
lar, raged with such violence, that many died of it  
daily; and it was deemed so contagious, that those  
who were not infected were afraid to approach the  
sick from the danger of infection. The prisoners  
conspired to bring this disease upon their master —  
They consulted one Kennedy, apprentice to Thomas  
Henryson, apothecary in Edinburgh, in the month  
of October or November preceding, and got from  
him some purgative powders and drugs, which they  
administered to the deceased in his drink and other-  
wise. The first purging powder wrought slowly.  
They then got a white powder, which operated to  
their wishes, so that the deceased had recourse to  
Hugh Brown, apothecary, his ordinary medical ad-  
viser. The prisoners took advantage of the sickness  
they had brought on him, by combining to steal his  
money and jewels, which he kept in an iron chest.  
That they might steal with the greater security, they  
also applied to Kennedy for intoxicating, or sopori-  
ferous draughts; obtained from him a medicine which  
he called syrup of poppy, and gave it to their master  
when he was bad, and keeping the house, without  
his knowledge, or that of Brown his apothecary. It  
was mixed in his drink, and he fell in a deep sleep.  
They took out his keys, opened his chest, carried off

1676 a large gold chain, gold bracelets, a gold ring with a blue stone, two pieces of gold, twelve of silver, and five *purse pennies*, silver buttons, broatches, and various other articles. They then got from Kennedy several drugs, which he called powder of jalap, and crystal of tartar, which they gave to their master. Clerk told Kennedy, that their master being ill, they had stole several pieces of coin from him, and that there were three bags of money in his chest; that they were resolved to take some of it, and would give Kennedy a part. They gave the jalap and the tartar to their master to counteract the effect of Brown's prescriptions.

On the Wednesday preceding their master's death, which happened on Monday the 15th of November, 1674, Anderson's friends visited him, and he told them he was greatly better. On this, the prisoners fearing his recovery, and that he should discover their practices, came to a positive resolution to murder him, communicated it to Kennedy, and sought poison from him to effect their purpose. But Kennedy would not give poison, saying the body would swell, and so they would be discovered; but he would give a powder which would do the business slowly, and which he would engage would kill their master in a month. They got a powder accordingly, which Kennedy called powder of jalap, but which, either in quality, quantity, or frequency of being administered, was truly poison. On the five days immediately preceding his death, the prisoners, and their associate Kennedy, held frequent consultations in the shop of Kennedy's master, in the house of the deceased, and in the King's Park. They gave Kennedy

part of what they had already stolen, and promised 1676 him an equal share of their future plunder. On Saturday night, the deceased was so well, that his apothecary said he would not visit him next day. On Sunday he was not thought near death, but rose, dressed himself, and supped in his usual stile. On Sunday night, the prisoners mixed some drugs in conserve of roses that had been prescribed for him by his own apothecary. These were so poisonous that he died on Monday morning at ten o'clock.— At five o'clock, their master called for the bed-pan, which they gave him. They then ran to the iron chest, filled their hands with jewels, goods, and money, belonging to their dying master, and did not look near him till about eight o'clock, when they found him speechless, the white of his eyes turned up, and the bed swimming around him. They then called in the neighbours to see him die.

Both the prisoners emitted confessions corresponding in general to the charge in the indictment. They added, that, before they conceived the idea of giving their master drugs to bereave him of life, they had frequently been in use to infuse powders in his drink, which made him outrageously drunk, that they might make sport of him in his drunkenness: a dreadful lesson to beware of the first steps in vice. Had they not infused powders to make their master drunk, in order to gratify a barbarous, and disrespectful mirth, the idea of taking away his life by similar means would not have occurred to them. They were convicted, and sentenced, on the 8th of February, to be hanged at the Cross of Edinburgh on the 1st of March, and their moveable goods to be forfeited.

1676 The trial of Kennedy, the apothecary's 'prentice, for furnishing the medicines, was brought on upon the 22d of February, 1676, and, after various adjournments, and a tedious confinement of eighteen months, he, on his own petition, on the 30th of July, 1677, was banished for life.

*James Gray, Litster\* in Dalkeith, for the Murder of Archibald Murray, Gentleman of his Majesty's Troop of Guards.*

1678 THE prisoner, by profession a dyer, was a lieutenant in the Duke of Lauderdale's regiment of Lothian militia. It happened that this corps, and the troop of guards to which the deceased belonged, were quartered at Glasgow. The prisoner was prosecuted at the instance of Sir William Murray of Newton, father to the deceased.† The indictment set forth, that the prisoner and the deceased, in company with some others, were drinking in the house of James Brown, bookseller in Glasgow. The deceased retired, the prisoner followed, and, conceiving deadly malice against him, killed him with a small sword.

Mr. John Ellies appeared as counsel for the prisoner. He said that, deadly malice being charged against

\* Dyer.

† Rec. of Just. 10th June, 1678. Fountainhall's Decisions, vol. I. p. 1.

the prisoner, it was incumbent on the pursuer to 1678  
prove that quality in the indictment. That, if any  
homicide was committed, which, however, he de-  
nied, it was done in self-defence. The prisoner and  
the deceased had no previous quarrel; they had not  
even the most distant acquaintance till the night on  
which the deceased expired; and the inferior station  
of the prisoner made it presumable that the deceased  
was the aggressor. He offered to prove, that the  
prisoner had received provoking language from the  
deceased: that, after the death, the prisoner, far from  
denoting guilt by flight, came back to the company,  
and sat with them for two hours; and that another  
person was present at the scuffle, with a drawn  
sword, by whom the wound might be given. He  
insisted, that *jurymen were unfit judges to determine  
upon circumstantial evidence*: that the Privy Council  
were wont, in matters of this sort, to take previous  
cognition; and they did so, particularly in the case  
of Thomas Menzies; and he prayed the Lords of  
Justiciary to make previous inquiry into the circum-  
stances.

Sir Robert Sinclair, counsel for the pursuer, answer-  
ed, that it being libelled that the prisoner did kill the  
deceased, was in itself relevant, if proved to convict  
the prisoner, without any proof of malice, 'that being  
'no necessary qualification of the libel, but the words  
'of stile.' And in our law there is no difference as  
to the crime, or the punishment of death, and con-  
fiscation of moveables, whether the killing proceeded  
from malice preconceived, or upon sudden rencoun-  
ter or chaudmell; for a slaughter being committed,  
it must be presumed to be done out of malice: that,

1678 as to drawing a conclusion of self-defence from the circumstances of this case, these circumstances were altogether frivolous; for, although the act 1661, chap. 22. sustained the plea of self-defence, yet it could only be admitted *salvo moderamine inculpatae tutelae*.

Mr. Ellies, in his reply for the prisoner, persisted that a jury was very unfit to judge on a circumstantial proof, and requested the Lords to appoint a pre-cognition to be taken.

The Lords found the indictment relevant, and that there was no necessity to lead a separate proof to establish forethought malice.

The following circumstance gave rise to the quarrel: The parties being heated with wine, the quarrel arose from the prisoner's saying, 'That a lieutenant to the Duke of Lauderdale was as good as to ride in the King's guard.' On this the deceased stormed, called the prisoner base fellow, to compare himself with gentlemen, and gave him the lie.

### THE PROOF.

George Murray, gentleman of his Majesty's troop of guards, deposed, he was drinking in the house of James Brown, in company with the prisoner, the deceased, and others. The deceased gave the prisoner the lie. Within half an hour thereafter, the prisoner and the deceased left the room, and the deponent sent one Thomas Hamilton to enquire after them. Instantly Hamilton and the prisoner returned, and the prisoner, wiping his sword, said, '*He had given him it.*'



James Hamilton of Little Preston deposed in terms of the preceding witness, with this variation, that the prisoner said, 'He *was afraid* he had done it.' 1678

Edward Watson saw the prisoner and the deceased fighting with drawn swords; the deceased went to a bookseller's shop to look at his wound, staggered, and fell on the street.

Lieutenant Joseph Douglas heard the prisoner, on being taken into the guard, say, he had parried two or three thrusts made at him by the deceased.

John Bain heard the prisoner say, the deceased had made three or four thrusts at him.

John Paterson, gentleman of the guards, heard the prisoner acknowledge he had killed the deceased, and declare, that, if it were to do, he would do it again.

Ensign George Murray heard the prisoner say, the deceased and he had been combating, and that he was sorry the wound was not through the deceased's heart.

Thomas Hamilton deposed, that, after words had passed between the prisoner and the deceased, they went down stairs together and drew: he heard the prisoner say, he was afraid he had killed the deceased.

Hall, the surgeon, deposed, that the wound and the prisoner's sword tallied; the wound was ten inches deep, and the deceased died of it in forty-eight hours. The prisoner sent for the deponent the day after the combat, and desired him to use all means under heaven for the deceased's cure.

The jury pronounced the following verdict:—  
'Find the prisoner did commit the said slaughter

1678 ‘ upon the deceased Archibald Murray, and that with  
 ~~~~~ ‘ one vote. As to the second part, relating to the  
 ‘ pannel’s self-defence, the assize finds no such thing
 ‘ proven; but, on the contrary, that the pannel and
 ‘ the deceased came both out from the company,
 ‘ most likely upon one and the same design.’ He
 was sentenced to be beheaded at the Grass-market
 on the 3d of July, and his moveables to be forfeited.
 Much interest was used to obtain him a pardon: the
 Privy Council granted him a short respite; but, as
 the Duke of Lauderdale declined to interfere in ob-
 taining him a pardon, the sentence was executed on
 the 19th of July, and he suffered with great resolu-
 tion.

*John Chislie of Dalry, for the Murder of the Right
 Hon. Sir George Lockhart of Carnwath, Lord Pre-
 sident of the Court of Session, and Member of his
 Majesty’s Privy Council.*

1689 THE prisoner was brought to trial before Sir Mag-
 ~~~~~ nus Prince, Lord Provost of Edinburgh, as High  
 Sheriff within the city, and James Graham, John  
 Charteris, Thomas Young, and William Paton, bail-  
 lies; the murder having been committed within the  
 city.

The prisoner was brought before the Lord Pro-  
 vost on the 1st of April, 1689, to be examined con-  
 cerning the murder of Sir George Lockhart, com-

mitted on the day preceding. Sir John Lockhart of 1689 Castlehill, brother, and Cromwell Lockhart of Lee, nephew of the deceased, appeared in Court, and, in their own name, and in that of the children of the deceased, gave in an act of the meeting of Estates of Parliament, passed that very day, of the following purport: That the Estates having considered the supplication of the friends of the deceased Sir George Lockhart, for granting warrant to the magistrates of Edinburgh to torture John Chislie of Dalry, perpetrator of the murder, and William Calderwood, writer in Edinburgh, an accomplice; therefore, *in respect of the notoriety of the murder*, and of the extraordinary circumstances attending it, the Estates appoint and authorise the Provost and two of the baillies of Edinburgh, and likewise the Earl of Errol, Lord High Constable, and his deputes, not only to judge of the murder, but to proceed to torture\* Chislie, to discover if he had any accomplices in the crime. And they appoint two of each bench,† viz. the Earls of Glencairn and Eglinton; Sir Patrick Ogilvie of Boyne, Sir Archibald Murray of Blackbarony, Sir John Dalrymple, younger of Stair, and

\* By the act and declaration which the Estates of Parliament passed, just ten days after this trial, declaring King James to have *forfaulted* the crown, by illegal assumption and exercise of power, they declared, ‘That the use of torture, without evidence, and ‘in ordinary crimes, is contrary to law.’ Act of Estates, 11th April, 1684.

† The Scottish Parliament composed but *one house*. It consisted, after the Revolution, of three classes, the Temporal Peers, the Barons, i. e. knights of the shire, and the Burgesses, or representatives of the royal boroughs.

1689 Mr. William Hamilton, advocate, assessors to these judges. The Estates, at the same time, declare, that this extraordinary case shall be no precedent to warrant torture in time coming, nor argument to ratify it as to the time past.

The Lord Provost then entered a protest, that this act of the Estates of Parliament should not infringe the ancient liberties of the city; and Mr. David Drummond, advocate, one of the Earl of Errol's deputies, protested, that the Lord High Constable's absence should not affect his right to judge in the like cases, the murder having been committed during the meeting of the Estates. Being desired to concur with the magistrates in sitting on this trial, he refused to sit, unless the Earl of Errol, or his deputies, were sole judges.

The prisoner was then put to the torture, and declared, that he was not advised to the assassination of Sir George Lockhart by any person whatever: that, when at London, he told James Stewart, advocate, that, if he got no satisfaction from the President, he would assassinate him; and told the same to a person there of the name of Callender, and to Mr. William Chislie, his uncle. He confessed that he charged his pistol on Sunday morning, and went to the New Kirk, and having seen the President coming from the church, he went to the close where the President lodged, followed him, and, when just behind his back, shot him: that he was satisfied when he heard of the President's being dead; and, on hearing it, he said, '*he was not used to do things by halves.*' He also confessed, that, when at London, he walked up and down Pall-Mall with a pistol beneath his coat, lying in wait for the President.

The indictment against the prisoner was raised at 1689 the instance of John Gibson, procurator-fiscal of the city of Edinburgh, of Sir John Lockhart of Castlehill, and Cromwell Lockhart of Lee. It set forth, that assassination, murder, and man-slaughter, were contrary to the laws of God, nature, nations, and the laws and acts of Parliament of this kingdom: that, nevertheless, the prisoner had, of forethought felony, without the least provocation, murdered Sir George Lockhart in the manner already mentioned: that the prisoner was caught *red-hand*,\* by a multitude of witnesses, before whom he boasted of what he had done, as if it had been some grand exploit: by all which he was guilty of murder, or at least was *art and part* accessory to the same; for which he ought to be punished with death, and his moveables confiscated.

The jury consisted of ten landed gentlemen and five merchants of Edinburgh.

The prisoner judicially confessed the crime libelled, and declared that he committed the murder because he thought the deceased had given an unjust sentence against him. Being asked, ‘ If it was not ‘ a sentence pronounced in favour of his wife and ‘ children for their aliment? he declared he would ‘ not answer to that point, nor give any account ‘ thereof.’

\* *Red-hand* is a term in the Scottish law, signifying a criminal’s being caught in the fact. *Art and part* is also a term in our law, denoting that the person to whom it is applied is aiding and abetting in the case. *Art and part* is a translation of *ope et consilio*.

1689 Witnesses were then adduced, who deposed as follows:

James Stewart, advocate, deposed, that, in the month of September or October preceding, the prisoner discoursing with him concerning the injustice done to the prisoner in a decret-arbitral pronounced by Sir George Lockhart and Lord Kemney, in favour of his wife and children, for an aliment, said, he was resolved to go to Scotland before Candlemas and kill the President; to which the witness answered, it was the suggestion of the devil, and the very imagination of it a sin before God. To this the prisoner replied, ‘*Let God and me alone; we have many things to reckon betwixt us, and we will reckon this too.*’ The witness told this to many, and understood that the President was informed of the prisoner’s menaces, but despised them.

Mr. William Chislie, writer to the signet, deposed, That he had not seen the prisoner since April, 1688, who then expressed his resentment against Sir George Lockhart, threatening to assassinate him for having decreed an aliment of 1700 merks\* yearly to the prisoner’s wife and ten children. The witness told the President of it, but he despised the threat.

Mr. Daniel Lockhart, advocate, and Mr. Alexander Walker, student of divinity, saw the prisoner shoot the deceased. They seized him, and the latter of these witnesses assisted in carrying him to the guard. When seized, the prisoner said, ‘he had done the deed, and would not fly, and that was to learn the President to do justice.’

\* About £93 Sterling.

Sir David Hay, doctor of medicine, was going to 1689 visit the President's Lady. As he entered the close,\* he saw the President stagger and fall to the ground. He bled at the mouth, was carried into his house, laid upon some chairs, and immediately expired. He saw John Baillie, surgeon, probe the wound. The ball went in at the back, and out at the right breast.

The jury all in one voice, by the mouth of Sir John Foulis of Ravelstoun, their chancellor, (*i. e.* foreman,) found, by the prisoner's judicial confession, that he was guilty of the murder of Sir George Lockhart, &c. &c.; and by the deposition of witnesses, that he was guilty of '*murder, out of fore-thought felony.*' The verdict was subscribed by the whole jury.

The Lord Provost and Baillies of Edinburgh sentenced the prisoner to be carried on a hurdle from the tolbooth of Edinburgh, to the market-cross, on Wednesday the 3d of April instant; and there, between the hours of two and four of the afternoon, to have his right hand cut off alive, and then to be hanged upon a gibbet, with the pistol about his neck, with which he committed the murder. His body to be hung in chains between Leith and Edinburgh; his right hand fixed on the West Port, and his moveable goods to be confiscated.

Besides Sir George Lockhart, two other of the supreme judges in Scotland have been murdered: all

\* It was the close on the south side of the Lawnmarket, now called the *Bank Close*, from the Bank of Scotland being there.

1689 of them on account of causes to which they were either party or judge. Robert Galbraith, parson of Spot, one of the Senators of the College of Justice, on the 13th of February, 1543, was murdered by John Carkeitill, and his accomplices, on account of some favour shewn to Sir William Sinclair of Herdmanstoun.\* As the records of Justiciary for that year are missing, I know not whether the murderers were brought to punishment. John Graham, parson of Killearn, and one of the supreme criminal judges, married the widow of Sandilands of Calder, who was amply endowed by her former husband. Graham commenced and carried a distressing law-suit against young Sandilands, his step-son; and Sir James Sandilands, uncle and tutor to the young gentleman, assisted by a body of his friends and followers, in revenge murdered Graham in Leith-wynd, one of the principal avenues to the city of Edinburgh, on the first of February, 1592. The perpetrators were neither brought to trial nor punishment. But seven years after, the grand-father, or grand-uncle of the great Montrose, attacked Sir James Sandilands with an armed force, as he was going into the Court of Session; and, after obstinate resistance, left him desperately, and, as the assailants thought, mortally wounded. By a late statute, to kill any of the Lords of Session, or Justiciary, when in the exercise of their office, is declared to be high treason.

\* Books of Sederunt, 13th February, 1543. MSS. Memoirs of the family of Herdmanstoun. *Johnstoni Historia Rerum Britannicarum*, p. 172, 253. *Annae*, An. 7. cap. 22.



*John Master of Tarbett, Ensign Andrew Mowat, and James Sinclair, Writer in Edinburgh, for the Murder of Elias Poirer Sieur de la Roche.*

THE prisoners were indicted at the instance of 1691 George and Isaac Poirers, Sieurs de la Roche, Frenchmen, Protestant refugees, and gentlemen of his Majesty's troop of guards, and of Sir William Lockhart, Solicitor-General. The indictment contained a charge against the prisoners, of entering, on the eighth of the preceding month of March, about twelve at night, into the bed-chamber of George Poirer,\* one of the pursuers, while he lay sleeping in bed, in the house of John Brown, vintner, Leith, in which house he was quartered, and giving him wounds to the effusion of his blood: that, upon their being removed out of the room, they returned, and endeavoured to break open the door. On this George rapped on the ceiling of his room for his two brothers, who slept in the room above, to come to his assistance. They came accordingly, half clothed, and totally unarmed; and the prisoners, all of whom were armed, did violently assault them, give them many wounds, and run the deceased Elias Poirer through the body with a sword, of which he instantly died.

The prisoners recriminated, by presenting an indictment, at their instance, charging the Sieurs de

\* Records of Justiciary, 18th August, 1691.

1691 *la Roche* with assassination and murder. It set forth, that the Master of Tarbett, Mowat and Sinclair, on the night libelled, were obliged, by a heavy storm, to take shelter in Brown the vintner's house. While they were sitting quietly at the fire-side in the hall, drinking some ale, till beds should be got ready for them, George, Isaac, and Elias Poirats, and James de la Massie, another Frenchman, having formed a conspiracy to murder them, entered the hall with cocked pistols in their hands, and swords under their arms; the Master of Tarbett, and his companions, being then totally unarmed. They fired two pistols loaded with ball, at the Master of Tarbett, and then, with drawn swords, attacked the company, who were much wounded, by parrying the thrusts with their hands; and, in the scuffle, there being but little light in the room, the *Sieurs de la Roche* did murder the deceased Elias Poret, their own brother.

After long arguments, which it is unnecessary to transcribe or abridge, the Court sustained the libel against the Master of Tarbett, Mowat, and Sinclair; and found the defences offered for the Frenchmen relevant to set aside the indictment against the latter.

The jury were, Lord Bargenie, William Baillie of Lamington, James Nicolson of Trabroun, Sir Robert Gordon of Gordonstoun, Thomas Hay of Balhousie, Sir George Suttty of Balgony, Sir William Ker of Greenhead, John Keirie of Gogar, John Scot of Rhynolds-burn, William Calderwood of Pittedy, Sir William Binning of Wallyfoord, Sir James Fleming of Rathobyres, James Scot of Bowhill, Sir James Dick of Priestfield, and Peter Wedderburn of Gossford.

The prisoners objected to the receiving of James de la Massie as a witness, on account of intemperate expressions of malice and resentment; and the fact being proved, the witness was repelled. 1691

Christian Erskine, late servant to John Brown, vintner, Kirkgate, Leith, deposed, that the Master of Tarbett went into George Poirer's chamber after twelve at night, and the deponent hearing a little noise in the chamber, went in with a candle, and saw the Master of Tarbett standing at George Poirer's bedside, and the said George sitting up naked in his bed, the bed-clothes at his feet, his night cap off, and a little drop of blood on his cheek. They were speaking French together angry like; the deponent called for Ensign Mowat, who was sitting at the fire-side in the hall, for she thought him the soberest of the company; at the same time, she could not pronounce any of them drunk. Upon Mowat and another person's coming into the room, the Frenchman took down his sword, which these two and the Master of Tarbett forced out of his hand. She saw no blows at that time, but entreated Mowat to take the Master of Tarbett and the other person out of the room, which was done accordingly; and the other person, *who was none of the prisoners*, carried the Frenchman's sword with him out of the room into the hall. Mowat desired the witness to keep the door close, and none of them should come back again. None of them had arms when they were in the Frenchman's room, except the sword which they had wrested from him, as mentioned above. Soon after, the Master of Tarbett (as the deponent supposed) came back, and rapped once or twice at the

1691 door, saying, he would be in, to which she made no  
w answer. But, before the Master of Tarbett came  
again to the door and rapped, George Poirer got  
out of his bed, and rapped with the tongs on the  
roof of the room; and, in as short a space as the  
Frenchmen could put on a few clothes, they came to  
George Poirer's chamber door, and spoke French to  
him, but did not enter his room, and then went to  
the hall. The deponent then heard a noise in the  
hall, and some folk speaking Scots, and immediately  
after heard the shot of a pistol, and saw the smoke,  
but knew none of the people where the pistol was  
fired, save Isaac Poirer, whom she thereupon pulled  
back, and found him with a drawn sword in his  
hand, his hand streaming with blood, and his  
little finger almost cut off. As she was coming back  
with Isaac, in order to get him into his brother's  
chamber, she found a man under her feet in the floor,  
which turned out to be Elias Poirer lying dead. She  
saw a drawn sword or two in the company, but can-  
not specify who held them. She did not see the pri-  
soners wound any of the Frenchmen, or kill the de-  
ceased; and the deceased's sword was not drawn:  
nor did she see the prisoners in the room after  
the deceased was killed. When Ensign Mowat was  
brought into the room where the dead body lay, he  
did not wax pale, as charged in the indictment, but  
looked very well upon it, desired to see the body,  
and asked the deponent, if she knew who killed  
him? The deponent added, that the Master of Tar-  
bett had seen a coach at the door, and asked her if  
it was to hire, and to whom it belonged? and she  
answered, it was hired by the Laird of Mey, who

was in the house; upon which the Master of Tarbett <sup>1691</sup> said he would see him; and she shewed him into the room accordingly. The witness farther added, that the occasion of the Master of Tarbett's leaving the fire-side where he sat, and going into George Poirer's room, was to follow Jean Thomson, whom he supposed to have gone into that room. The prisoners had laid aside their swords in the room where they were to lodge, as had the Master of Tarbett his periwig, before they entered Poirer's room; and Sinclair, the other prisoner, was asleep in Mey's room an hour before the disturbance happened.

Jean Thomson, late servant to John Brown, vintner, aged nineteen, deposed, That, on the night labelled, between twelve and one, the Master of Tarbett being in her master's house, and calling for a drink of ale, desired the deponent to sit down by him, which she refused, but afterwards she sat down. Being called to draw ale, she went to the cellar and drew the ale; when she came up, she did not go into the room where the Master was, but sat down on a chest at a bed-side, where the Master came and sat down beside her; upon which she rose, went into a room where she used to lie, and bolted the door: but hearing a noise in George Poirer's room, she came to the door of that chamber, where she found Ensign Mowat, the other servant having before that carried in a light, on account of the noise. Mowat carried the Master of Tarbett and another person out of the room in his arms, and, when Mowat was thus taking them out, the Master of Tarbett said to him, *he would go back and crave the gentleman's pardon.* Soon after, the Frenchmen came down stairs, armed

1691 with swords and pistols; their swords not drawn at that time. They spoke to their brother George, and then went through the hall, Isaac Poirer having his sword drawn. The Master of Tarbett and Mowat were then in the hall; she did not see them have any arms, nor assault the Frenchmen. At the sight of a drawn sword, and the command of her master, who by this time was in the hall, she went out to call the guard, and, as she went down stairs, heard a shot. This witness concurred with the former in deposing, that, long before any disturbance happened, Sinclair, one of the prisoners, was asleep in another room; and that the Master of Tarbett and Mowat, on coming into the house, laid aside their swords in the room where they were to sleep.

John Brown, vintner, deposed, That, on the night libelled, he was in bed in a little room off the hall, and knew nothing of the disturbance in his house till Jean Thomson rapped at his door. On this he rose hastily, and heard a great noise and crying in the hall; and, when he came there, he found Elias Poirer lying dead, and nobody in the room beside him but Christian Erskine. He went instantly to call the guard; and, on his return, when they were removing the body, he found a pistol in the floor, snapped and charged, and a sword in the scabbard. As he returned from calling the guard, he raised several of the neighbours; one of them, Robert Aitcheson, told him he had seen one of the murderers pass. Upon this the witness took a candle and lantern to a fore-stair, where Aitcheson said the murderer was, and there he found Ensign Mowat, standing behind a deal, on a knocking-stone under the fore-

stair.\* He was desired to come out, but made no reply for a good space. The company and constables then presented muskets to him, upon which he came out, and the company and constables took a sword from him, which they delivered to the deponent, who, however, did not see the sword taken from him, he being surrounded by the people. The sword was naked, much bent, and bloody both in blade and hilt. The witness ordered the constables to carry Mowat straight to prison; and, next day, when he went with the magistrates to the prison, he saw Mowat's right hand with a wound on it. He was also present when the surgeon compared this sword with the hole in the deceased's coat, and the orifice of the wound: it corresponded with the hole in the coat, and the surgeon said it did the same with the wound. The witness added, that the Master of Tarbett came to his house, on hearing that the Laird of Mey and Mowat were there; that the coach being gone and the night rainy, he resolved to stay and lie with Mey, the deponent having no other bed for him. The Master of Tarbett ordered his servant to go to his lodgings, and tell that he was not to be at home, and to bring him clean linens next morning.

Andrew Fairbairn deposed, he was with the constables when Mowat was seized; he came not out till the muskets were presented. He said he was an unarmed man, but on searching him they found a

\* A knocking-stone is a stone-mortar, formerly much used by the common people for beating the husk off barley ere they put it in the pot.

1691 drawn sword under his coat. The sword was bloody from hilt to point, and was much bent, and there was blood on Mowat's sleeves. When Mowat heard that a man was killed, he desired to see the body, for what cause the deponent knows not. On seeing it, Mowat said, 'God knows who has done it,' and there was no emotion or paleness visible in his countenance. When the Master of Tarbett was carried prisoner before the commandant, he was so apprehensive of bodily harm from the Frenchmen, that a stronger guard was sent for, to protect him from their fury.

Robert Aitcheson saw the prisoner Mowat come out below the fore-stair when desired, did not hear him say he was an unarmed man, but saw the bloody sword taken from him. The witness supposed the blood to proceed from a wound in his hand. James Johnston saw the bloody sword taken from Mowat, and imputed the blood to the same cause.

Robert Brown, surgeon, deposed, he was called by the magistrates of Leith, on the morning after the murder, to inspect the wound. The hole in the coat corresponded with the sword produced; but as for the wound he could only say, that the dimension and figure of wounds alter and contract after ten or twelve hours.

The jury, by the mouth of Sir William Ker, chancellor, *found none of the crimes proved.*

Although I am persuaded that an intelligent jury in these days would acquit the prisoners, yet the verdict in those times was very uncommon, and I am by no means certain upon what principle it proceed-



ed. The jury could hardly refuse a clear assent to this proposition, that it was Mowat who killed Elias Poirer. The Master of Tarbett was the first aggressor in the scuffle, and his assault on George Poirer was such as would have excused any *immediate* act of violence with which Poirer could have repelled it. But the situation of the Frenchmen, and that of the prisoners, came to be reversed the moment that they sallied forth of George Poirer's room, entered the hall, and assaulted the prisoners with sword and pistol. As the prisoners were then in actual and imminent peril of their lives, I apprehend that, supposing the killing to be established in the clearest manner, the prisoners were entitled to an acquittal, on the plea of *self-defence*.

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*John Gillespie, Merchant in Glasgow, John Anderson of Dovehill, and Robert Stevenson, Glazier in Glasgow, for the Murder of Major James Menzies.*

THE prisoners were prosecuted at the instance of Henry Fletcher, brother to the Laird of Salton, nearest of kin to the deceased, of Lieutenant-Colonel Hume, for the interest of his Majesty's forces, and of his Majesty's Advocate. It was charged in the indictment,\* that the prisoners having conceived

\* Records of Justiciary, 24th, 27th, 31st December, 1694; 2d January, 1695.

1694 mortal hatred at the deceased, did, on the 19th of October preceding, enter a garden upon the lands of Rainfield, where they understood the deceased was walking, and upon seeing him, they, or one or other of them, did discharge guns and pistols at him, and also struck him a blow on the head, which fractured his skull, of one or other of which wounds he instantly expired. Or, at least, that they were guilty *art and part* of this murder.

The defence stated for the prisoners was, that, in October last, in absence of the Colonel and Lieutenant-Colonel, Lord Lindsay's regiment, then quartered at Glasgow, was commanded by the deceased Major Menzies: that the Major summarily apprehended several inhabitants, burgesses of Glasgow, and kept them in custody of the military on pretence of their being deserters, but who really were not such: that complaint having been made to the magistrates by the persons confined, they desired the Major to bring these persons before them, that the complaint might be tried conform to the act of Privy Council, 16th December, 1692, but the Major absolutely refused to comply with their desire. The magistrates issued a formal edict, requiring him to produce the complainers, but this also he treated with the most pointed contempt. Proceeding then with the utmost gentleness, they demanded a conference, to which the Major having consented, the Provost, two of the baillies, and Mr. Robert Park, town-clerk, met with Major Menzies and three captains of his regiment, in the town-clerk's chamber. The conference began with the Provost's desiring of the Major that the prisoners might be brought before them,

and Mr. Park, the town-clerk, in a very civil manner, joined in the request. Upon this, an altercation between the Major and the Town-clerk took place; the Major gave him bad language, and struck him with a cane, he, the Town-clerk, having no weapon in his hand. On this they wrestled, and being separated by the company, and while the Town-clerk was held by Captain Jarvais of Lord Lindesay's regiment, the Major drew his sword, and run the Town-clerk through the body, of which he died instantly. The Major marched off sword in hand, repaired to the guard-house, ordered his men to charge their muskets, drew them up across the street three file deep, and set them to guard passes in order to favour his escape, mounted horse and fled.

Upon this, Mr. Francis Montgomery, one of the Lords of Privy Council, ordered such of the inhabitants as could be soonest got ready, to pursue and apprehend the murderer. In obedience to this order, the prisoners went in pursuit of the Major, came to a garden at Rainfield, where they were informed he skulked. On coming up to him, they charged him with the murder of the Town-clerk, and desired him to yield himself prisoner; but this he refused, and opposed them with a drawn sword, upon which he was killed. Various arguments in point of law were also offered for the prisoners, and much casuistry was likewise advanced for the prosecutors.—These debates occupy fifty pages folio of the criminal record; but it were superfluous, or improper, to state them here.

The Court sustained the indictment against the prisoners, as relevant to infer the pain of death; but

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1694 they also sustained this defence as sufficient entirely to cast the indictment, viz. that they pursued the Major by order of a Privy Councillor, or of the magistrates of Glasgow, proceeding upon the notoriety of the murder; unless the prosecutors should prove that the Major offered to surrender himself before attacked by the prisoners. This again they sustained relevant to set aside the defence, in respect to such of the prisoners only, as did actually kill, or give command to kill the Major; but by no means to infer *art and part* against any of the other prisoners, they being *versantes in licito*.

### THE PROOF.

Robert Pollock, younger of Milnbourne, deposed, he was at Rainfield on the 19th of October last, where he saw the three prisoners, but none of them had arms except Dovehill, who had a carabine, but it was not he who killed the Major, for the former was standing with the witness at the garden door when they heard the shot. Upon going up to the place, they saw the Major lying on his back dead, his face bleeding, and a drawn sword in his hand across his breast. Afterwards, when they came to Renfrew, he heard the prisoner, Gillespie, acknowledge he shot the Major; but the witness did not see him have any fire-arms in his hand, nor did he see Gillespie either receive from, or return any arms to Dovehill. When Gillespie first acknowledged that he shot the Major, he did not speak of the latter's having made any resistance; but, after he was taken into custody, he declared, that, if he had not done

the thing he did, the Major would have run him 1694  
through the body. ~~~~~

Peter Paterson, late baillie of Renfrew, went with the three prisoners into the garden of Rainfield the night Major Menzies was killed; is uncertain whether all the prisoners had arms, only that Dovehill had one or two pistols. He did not see Dovehill give a pistol to Gillespie, but, after the Major was killed, saw Gillespie deliver a pistol to Dovehill, saying, 'there is your pistol.' Dovehill and young Milnbourne, a former witness, stood at the garden door, while the deponent going forward with the two other prisoners, Gillespie and Stevenson, came up with the Major, and one of them said to the deponent, 'Baillie, here is a man.' The man called out, 'What is the matter, Sir?' to which the witness answered, there was a man slain in Glasgow; that the slayer was supposed to be skulking hereabout, 'and if you be the man, God Almighty forgive you.' The person replied, 'it is none of your business.' One of the prisoners then called out, 'Dovehill, here is the man.' The Major cried with an oath, 'What have the rascals ado with me;' immediately drew his sword, and advanced upon them in great rage; the deponent and the prisoners retreated; he then heard a shot, but knows not whether it came from Gillespie or Stevenson. When he returned, he saw the Major lying on his back dead, and his sword in his hand, lying across his breast.

Captain Jarvais, of Lord Lindesay's regiment, a witness adduced for the prisoners, was present at the conference between the Provost of Glasgow and Major Menzies. He heard the Major call the Town-

1694 clerk 'a fool,' and the clerk answered him, 'he was  
~ 'but an ass.' Upon this the Major struck the clerk  
over the head with his cane, and the clerk returned  
a very severe blow with his fist. The company  
separated them, and the Major drew his sword,  
made a thrust at the clerk, who immediately cried  
out he was wounded, and clapped his hand on the  
wound; and, as he was going to another room, the  
deponent saw the clerk fall, and lie on the floor.  
The witness went to the guard-house, but found the  
Major was fled. The clerk had no arms.

Simon Tennent, one of the baillies of Glasgow,  
heard the Major call the Town-clerk a fool, and the  
Town-clerk call the Major an ass; saw the Major  
strike the former with his cane. The parties then  
grappled, and were separated, when the deponent  
saw the glance of a sword pointed towards the clerk,  
who immediately cried out, 'a surgeon,' and died  
in about seven minutes. He was told by all the com-  
pany it was the Major who killed the clerk; and the  
latter, at the time of his death, had no arms, not  
even a staff, in his hand.

James Gemmill, junior, merchant in Glasgow, on  
the day Mr. Park was killed, saw the Major come  
out of his, the Town-clerk's chamber, in haste, want-  
ing his wig, and his sword drawn; saw him wipe  
his sword with the lap of his coat, and return it into  
its scabbard. Before the Major could arrive at the  
guard-house, whither he was going, the deponent  
heard that the clerk was wounded, and then was  
told he was dead.

Captain Lindesay, of Lord Lindesay's regiment,  
was present at the scuffle between Major Menzies and

the Town-clerk; saw the Major's arm in the attitude 1694  
of pushing with a sword; and, immediately after the  
lounge, the clerk cried he was wounded. The for-  
mer left the room without his wig; the deponent  
took up the wig and followed, accompanying the  
Major to the Gorbals, where he took horse and fled.

William Napier, Provost of Glasgow, was in the  
Town-clerk's chamber the day he was killed. Upon  
the notoriety of the murder and flight, he gave or-  
ders to the three prisoners to pursue and apprehend  
the Major.

Mr. Francis Montgomery, one of the Lords of  
Privy Council, deposed; that, on the day of the mur-  
der, he was applied to by the Provost and Magistrates  
of Glasgow, to concur with them in securing the  
peace of the city, which was in an uproar. The de-  
ponent went to the Town-clerk's chamber, whose  
dead body he found lying on the floor, and every  
body crying that Major Menzies was the murderer.  
The deponent concurred with the Magistrates, in or-  
dering Dovehill, then in the room, to take some of  
the honest town's-folk along with him, and to pur-  
sue and apprehend the murderer; upon which the  
people dispersed peaceably.

The jury unanimously found the indictment not  
proved, found the prisoners' defence in terms of the  
interlocutor proved; and found it not proved that  
the Major offered to surrender himself, upon which  
the prisoners were dismissed from the bar.—They  
had little regard for the Major's memory who raised  
so absurd a prosecution.

*George Cumming, Writer in Edinburgh, for the Murder of Patrick Falconar, Soldier in Lord Lindsay's Regiment.*

695 THE indictment set forth, that the prisoner, being upon the street of Portsburgh, a suburb of Edinburgh, on the 5th of the preceding month of September, between nine and ten at night, the deceased Patrick Falconar, and other two soldiers of Lord Lindsay's regiment, walked peaceably by him in the way to their quarters; when the prisoner gave the soldiers opprobrious language, and, without any just provocation, drew his sword, with which he maliciously run the deceased through the body, of which he died within twenty-four hours.

The parties were pretty much agreed as to the facts which gave rise to this prosecution: That the prisoner, entertaining a notion that the soldiers had made a rude answer to his companions, who inquired of them what o'clock it was, gave the soldiers abusive language, upon which they went up to him, and attacked him with their drawn bayonets: that the prisoner received them with a drawn sword, and, after some skirmishing, killed the deceased.

Defences were made by the prisoner's counsel, and answers by the public prosecutor; but as, in a

\* Rec. of Just. 11th, 18th, 20th, 21st November, 1695.



subsequent trial,† I shall have occasion to treat as 1695  
fully as the nature of this work will admit, of the  
distinction between murder and manslaughter by the  
law of Scotland, of culpable and casual homicide, of  
killing upon provocation, or in self-defence, I shall  
here state only the heads of the defences, and an-  
swers that were made in the course of this trial.—  
It was alledged for the prisoner, *1mo*, That he enter-  
tained no malice prepense against the deceased; and  
that this was but an accidental rencounter; *2do*, That  
he killed the deceased in self-defence; *3tio*, Whereas,  
it was argued, that, when the deceased, and his fel-  
low soldiers advanced upon the prisoner with drawn  
bayonets, he should not have received them with a  
drawn sword, but should have endeavoured to ap-  
pease their fury, or should have fled; it was answer-  
ed, that argument and entreaty were very unequal  
weapons to contend with pointed steel; and that there  
was no obligation on the prisoner to fly. It was re-  
plied by his Majesty's Advocate, that there was no  
necessity for charging the murder to have been pre-  
meditated; for manslaughter, in the eye of the law,  
did in itself imply guile and malice, unless the con-  
trary was proved. *2do*, That the plea of self-defence  
was only competent to him who sustained a wanton  
attack, not to one who, by provoking language, had  
drawn the attack upon himself: that the prisoner  
was the cause of the quarrel, had given rise to the  
injury, and was thereby debarred from pleading self-  
defence against an assault instigated by his own inso-  
lence.

\* Trial of Carnegie of Finhaven, for the murder of the Earl  
of Strathmore.

## THE PROOF.

James Porteous, apothecary in Edinburgh, deposed, that, in the beginning of September last, he was one evening in the street of Portsburgh; between nine and ten o'clock, in company with three other persons, of whom the prisoner was one. The prisoner went to a house to call for his cloak, and the deceased, with two other soldiers, came up with the deponent and his companions, who asked at them, 'what o'clock it was?' He cannot be positive what answer they made; but the prisoner, who was a little way behind them, called the soldiers sons of whores and sons of bitches. The soldiers asked what he said, and he repeated the words, calling, at the same time, to his companions to beat the soldiers. The soldiers then drew their bayonets, passed by the deponent and his companions, and went up to the prisoner, who advanced to them, and, when he was within sword's length of them, drew it, and, within a quarter of an hour, the deponent heard one cry, Murder! That same evening he called at the prisoner's lodging, whom he found in deep concern, declaring he had given the soldier a stab, and he was afraid it would prove mortal: at the same time he drew his sword, and spit upon it, endeavouring to wipe the blood off it. The prisoner came next morning to the deponent's chamber, told him he had been at Lauriston, and there was very bad news; the soldier was dead.

John Hall, writer in Edinburgh, was returning from the country one evening in the beginning of September, with the prisoner and other two com-

rades. When they came nigh the West Port, the prisoner went to a house for his cloak. In the mean time three soldiers came up with the deponent and his companions. He cannot be sure what answer the soldiers made, when asked what o'clock it was; but the prisoner called out to them, 'Ye sons of 'whores, what answer is that to give to gentlemen?' On this the soldiers drew their bayonets, passed the witness, and went up to the prisoner. In a little he heard the clashing and saw the glancing of swords; upon which he went up to the combatants, and relieved the prisoner of one of the soldiers with whom he was engaged; and, very soon after, he heard one cry Murder! He then went off; and, in his way, he called at the house of one Widow Lindesay, who told him that the prisoner had been there with his sword drawn, and had left word, that he had gone home, whither the witness followed him. He found him sitting pensive and exceeding sorrowful, expressing his fears that the soldier had got a mortal wound. The deponent saw blood on his sword, went with him next day to Laurieston, and, when they heard that the soldier was dead, the prisoner clapped his hand on his thigh, and was greatly agitated.

Two surgeons swore, that, upon being called to the deceased, they found him run through the body with a small sword; that the wound was mortal, and he died of it next day.

The jury returned this verdict: 'They, all in one voice, find proven, that some words falling out between George Cumming, the *pannel*\*, and three

\* Prisoner.

1695 ‘soldiers, in the West Port, in the month of Sep-  
 ‘tember last, *the soldiers drew their bayonets, and*  
 ‘*advanced to the said George, who, when the soldiers*  
 ‘*were within the length of his sword, drew the same,*  
 ‘*and, defending himself, Patrick Falconar, one of*  
 ‘*the three soldiers, was killed; whereby the assize finds*  
 ‘*the pannel guilty of manslaughter.*’ The Court  
 sentenced THE PRISONER TO BE HANGED,  
 AND HIS PERSONAL ESTATE TO BE FOR-  
 FEITED.

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To condemn an innocent man to death, by the sentence, and forms of law, has ever been looked upon as one of the greatest moral evils. From the general aversion of mankind to inflict undeservedly the pain, and, what is infinitely worse, the ignominy of a public death, I hope it is a case which has rarely happened, except through the bloody ministers of clerical superstition, and imperial power; the last of which makes a sport of life and liberty, while the first claims a still wider dominion, over life, liberty, and understanding; over liberty not only of *action*, but of *thought*.

To maintain that there is no difference, in the degree of moral turpitude, between a deliberate murder, and a rencounter originating from sudden provocation and terminating in death, is to contradict the perceptions of the understanding, and the feelings of the heart: and it does not appear that, in this article, the old law of Scotland was repugnant to our judgement or our feelings. ‘The absurd proposition, that there is no distinction between murder and man-

slaughter, between deliberate assassination and killing of a suddenly, appears to be of no older date than the Restoration. At that period our courts of law became highly tyrannical; and those who possessed a criminal jurisdiction displayed what, indeed, was no novelty in this country, a very sanguinary spirit. A celebrated lawyer\*, who scrupled not to sacrifice abilities and principle at the shrine of despotism, has left a specimen of his attempt entirely to set aside trial by jury.† The mode of proceedings in our criminal courts, in the tyrannical and turbulent reign of Charles II. by the address of the King's counsel, underwent a material innovation. In our records previous to this æra, juries are found to have returned a general verdict of *guilty, or not guilty*; the words of stile were, '*syllit culpable and convict*,' or, '*clean and acquit*.' But, after the Restoration, prosecutions became so frequent against rebels, covenanters, and attendants upon conventicles, that it was matter of difficulty to get a jury to find a verdict against a state criminal, particularly an attendant upon conventicles. His Majesty's Advocate, to evade this reluctance, fell upon a device which almost totally annihilated the powers and purposes of a jury. It was, to introduce a doctrine, that, in no case whatever, the jury had a right to exercise their judgment upon any point, except the evidence relating to the different facts charged in the indictment: that, in every case, they were to decide merely upon the fact; and that it was the province of the judges to

\* Sir George Mackenzie. Arnot's Hist. of Edin. p. 149.

† Mackenzie's Criminals, tit. *Assinners*.

1695 determine the import of their verdict, in the scale of guilt, from a capital crime down to pure innocence: that, therefore, it was the business of the jury not to find *guilty* or *not guilty*, but *proved* or *not proved*; and to apply such findings to the different charges, trifling or important, exhibited in the indictment.

The lawyers for the Crown devised another expedient which degraded jurymen from the *palladium* of liberty, to a senseless instrument of tyranny; an expedient which vested the power of convicting in the judges, when the jury doubted not only of the *criminality of the fact*, but even of the *fact itself*. For this purpose they drew up their indictments very circumstantially, not only stating the crime, but also the minute facts, trifling or important, from which they inferred the prisoner's guilt; and, upon these indictments, the Court used to pronounce an interlocutor, finding either the crime in general, or the facts and circumstances specially libelled, relevant to infer the pains of law. When it was suspected that a jury would scruple to find a crime in general proved, they were required to return a *special verdict*. Accordingly, they were often weak enough to return a verdict finding proved a long chain of circumstances specified in the indictment, leaving it entirely in the breast of the judges to determine whether these circumstances did establish the fact libelled.

Thus, in the trial of Robert Carmichael, school-master, for the murder of one of his scholars, a son of Douglas of Dornock, it was proved that the boy was in perfect health at two in the afternoon, when he went to school, and that before three he was carried out of it dead. It was found by the jury that

the prisoner did three times successively make the deceased be held up, and severely lashed him on the back and hips, ' and in rage and fury, did drag him ' from his desk, and did beat him with his hand upon ' the head and back, with heavy and sore strokes, ' and after he was out of his hands he immediately ' died.' That, after the boy's death, the side of his head was swelled, and there were livid marks on it; and the mark of many stripes on his legs and thighs. Although these circumstances, as well as a rattling noise in his breast upon the third beating, and a good quantity of blood being found under his body after death, (which had issued from the stripes on his back,) afford complete conviction\* that he died of the beating; yet the lenity of the Court in this instance seemed to increase with the barbarity of the criminal, for they only sentenced him—to receive seven stripes, and to be banished Scotland for life.†

It is obvious, that, from the moment these iniquitous doctrines were acquiesced in, the *palladium of liberty* was gone. *Facts* might be charged, of which the guilt, or degree of guilt, depended solely upon the *intention* which directed them. A fact might be indisputable; yet the intention of the accused might be justifiable, or at least might not amount to the degree of criminality charged in the indictment; yet by this doctrine the jury would be mere cyphers, the Court alone would decide. Facts of the most criminal nature, circumstances trifling or indifferent, might be blended in one indictment;

\* The body of the deceased was not opened.

† Records of Justiciary, January 15th, 16th, 19th, 1700.

1695 and, in such case, a *special verdict* would leave the prisoner at the mercy of the Court, which it is the grand purpose of the trial by jury to prevent. I have discovered an instance of the Court's actually taking advantage of a circumstance of this sort. In the trial of Captain Douglas, and two other men, for committing a rape on Christian Davidson,\* the jury found 'the violent ravishing Christian Davidson, *or being art and part thereof, not proven.*' But found, that, on the night libelled, Captain Douglas left, for three quarters of an hour, a company with which he was drinking; and that, on his return, he told the company, when challenged for his absence, *ut virginem deflorasset*, and shewed his knee dirtied with mud. The Court fined him in 300 merks. There is another case in which the jury made an absolute surrender of their privileges. In the trial of Marion Lawson for child-murder, they found the prisoner *not guilty, in respect of no probation*;† but, in respect of the *presumptions, remit the prisoner to the consideration of the Court.* The Court sentenced her to be whipped and banished.

In this case of Cumming, there were no circumstances to entitle the Court to pronounce upon the prisoner the *poena ordinaria*, the ordinary penalty of murder. The verdict of the jury set forth, that some words fell out between the prisoner and the soldiers; but did not find who gave rise to the verbal injury. But, supposing the opprobrious expressions used by the prisoner to have proceeded from mere wanton-

\* Records of Justiciary, 8th, 22d, 23d Feb. 1697.

† Ibid. 1st Aug. 1662.



ness, I apprehend it did not entitle three men, with 1695 drawn swords or bayonets, to assault one. And it cannot be maintained, without the height of absurdity, that this one, even after having used insolent language, was to stand tamely and have his throat cut for his impertinence. The jury found that the prisoner, *in defending himself, killed the deceased*: the Court condemned the prisoner; *therefore, the Court condemned a man to be hanged for defending himself*. The same judges\* who sat on this trial pronounced the dreadful doom on the youth, who atoned with his blood, for entertaining, on religious matters, opinions dissonant from those of the times.

How juries came to recover their dignity and importance, will be seen in the subsequent trial of Carnegie of Finhaven.

*James Carnegie of Finhaven, for the Murder of Charles Earl of Strathmore.†*

Counsel for the Prosecutors,  
Dun. Forbes of Culloden, Esq.  
his Majesty's Advocate, &c.

Counsel for the Prisoner,  
Robert Dundas of Arnis-  
ton, Esq. &c. &c.

THE prisoner was prosecuted at the instance of 1728  
Susanna Countess of Strathmore, relict of the de- ~~~~~

\* With the exception of James Falconer, Lord Phesdo, who sat not on the trial of Aikenhead. See *infra* Blasphemy, Aikenhead.

† Records of Justiciary, 10th July, 1st, 2d, 3d August, 1728.

1728 ceased, of the Honourable James Lyon, his brother, and nearest lawful heir, and of his Majesty's Advocate, for the murder of the Earl of Strathmore. It was charged against the prisoner in the indictment,\* that, having a causeless ill-will at the deceased Earl of Strathmore, and conceiving deadly malice against him, he, on the 9th day of May preceding, between the hours of eight and nine at night, without the least provocation then given by the Earl, did assault him with a drawn sword, and feloniously murder him, by giving him a thrust with the sword into the belly, and through the intestines, till it came out at his back, whereof he died on the Saturday after; or, at least, that he was guilty art and part of murder, or manslaughter, or one or other of them.

Long, learned, and ingenious pleadings, were made on the conclusion of the indictment; the counsel for the pursuers maintaining, that it inferred the pains of death; and those for the prisoner contending, that it inferred but an arbitrary punishment. The Court appointed informations in writing to be lodged on both sides.

*Substance of the Pursuer's Information.*

The information for the pursuer relates to the defences stated, *viva voce*, for the prisoner, and its purpose is to obviate them. It is there contended, that, by the Mosaic law, 'whoso sheddeth man's blood,

\* This case is published at large in the State Trials, vol. IX. p. 26. It occupies 35 pages folio. It is also published separately in 131 pages octavo.

‘ by man shall his blood be shed:’ that the benefit of 1728  
 the cities of refuge was only granted where the kill-  
 ing was merely accidental, since it was declared, that  
 ‘ he who smites with a throwing stone, or with a  
 ‘ hand-weapon of wood wherewith a person may die,  
 ‘ and he dies, the murderer is surely to be put to  
 ‘ death:’ although the argument is conclusive, that  
 wherever, by the law of Moses, capital punishments  
 are allowed, such punishments are lawful; it is not  
 equally clear, that in those cases where the powers  
 of the law are suspended by the *jus asyli*, afforded  
 in the cities of refuge, which was established by po-  
 sitive precept, that, in similar cases, in countries  
 where no such privilege is allowed, no such precept  
 established, the punishment should not be capital.

That, by the civil law, slaughter, in an affray, was  
 punishable by death, from which neither passion nor  
 provocation exempted, which is clear from it being  
 stated to the Emperor, whether a husband, who,  
 urged by the vehemence of his grief, should kill his  
 wife caught in adultery, be punishable as a murderer,  
 a case which could not have needed a reference, if  
 passion and provocation had mitigated the punish-  
 ment.

There next follows an elaborate and very lame ar-  
 gument, to prove, that, by the old statute law of  
 Scotland, little distinction was made between *pre-  
 meditated murder, culpable homicide,\** and *manslaugh-*

\* I embrace with great satisfaction this opportunity to mention,  
 that the Court of Justiciary has now solemnly repudiated this ab-  
 surd and iniquitous doctrine. In the libel at the instance of John  
 and William Stewarts, against Lieutenant George Storey, for

1728 *ter.* It is argued, that by the practice of our criminal Courts, still less distinction is made between these degrees of guilt. Indeed, that, to make any distinction at all, is directly repugnant to act 22d Charles II. A. D. 1661, and to the uniform decisions of the Court of Justiciary from that period to the present. And a variety of criminal cases in support of this doctrine are adduced, which confirm it in a wide latitude of absurdity and cruelty. From all these, the following conclusion is drawn: 'That neither the drunkenness of the pannel, (*i. e.* prisoner) nor provocation given him, nor the suddeny upon which the fact was committed, can afford a defence to the pannel to exculpate the slaughter, or lessen the ordinary punishment.'

That the only defence urged for the prisoner which was at all plausible, was, that intending to kill one man, he had killed another; instead of Lyon of Bridgeton, against whom the blow was directed, he had killed the Earl of Strathmore. On this branch of the argument, the information justly concluded, on the authority of the civil law, and of common sense, that, if the intention be murder, it makes not the least difference that another person than he at whom it was directed shall receive the mortal blow.

the murder of William Stewart, surgeon in Paisley, the jury, conform to the recommendation of the Court, returned the following verdict: 'All in one voice find the pannel, George Storey, not guilty of the murder libelled; but, at the same time, find him guilty of culpable homicide.'—The Court sentenced the prisoner, Storey, to pay 1000 merks of *assythement*, *i. e.* *solatium*, damages, to the private prosecutor, and to undergo eight months imprisonment.—Records of Justiciary, January 24th, 25th, 29th 1785.

It is next contended, that, by the law of England, 1728 killing of a suddenty, in many cases, is deemed murder; that, in such cases, malice prepense is often presumed; and that the facts, as stated by the prisoner, would be sufficient warrant for a verdict of murder by the law and practice of England.

*Substance of the Information for the Prisoner.*

It sets out with the declaration made by the prisoner at the bar, when asked by the Lords if *guilty or not?* in these words: ‘ My Lords,—I find myself ‘ accused by this indictment of maliciously murdering the Earl of Strathmore; but, as to any ill-will, ‘ malice, or design to hurt the Earl, God is my witness I had none: on the contrary, I had all the due ‘ regard, respect, and kindness, for his Lordship, that ‘ I ever had for any man. I had the misfortune that ‘ day to be mortally drunk, for which I beg God’s ‘ pardon; so that, as I must answer at God’s great ‘ tribunal, I do not remember what happened after ‘ I got the affront your Lordships will hear of from ‘ my lawyers. One thing I am sure of, if it shall ‘ appear that I was the unlucky person who wounded the Earl, I protest before God, I would much ‘ rather that a sword had been sheathed in my own ‘ bowels. And, further, I declare, that I do not so ‘ much as remember that I saw the Earl after I came ‘ out of the kennel, and even not so much as the ‘ drawing of my sword; and, therefore, I cannot acknowledge the libel as it is libelled.’

The facts are then stated which gave rise to this trial, viz. that, on Thursday the 9th of May, the

1728 ~ Earl of Strathmore, the prisoner, and others, dined at the house of a gentleman, whose daughter's funeral they had been invited to witness, and drank pretty freely: that, after the funeral, they went to a tavern in Forfar, where they again drank plentifully, and the prisoner was much overtaken with liquor, and Mr. Lyon of Bridgeton treated the prisoner with insulting and impertinent language: that the Earl of Strathmore went to visit the Lady Auchterhouse, a sister of the prisoner's, who accompanied his Lordship. Bridgeton followed them, renewed his impertinent language, prescribed to the prisoner how he should dispose of his daughters in marriage, and settle his estate, having no sons; upbraided him with being in debt; insulted the Lady in whose house they were, griping her arm rudely, so that Lord Strathmore thought proper to break off the visit. The prisoner and Bridgeton followed the Earl, and, when they came to the street, some words passed; and Bridgeton, speaking of the prisoner, said, '*God damn him,*' then took him by the breast, and pushed him over head and ears into a dirty kennel two feet deep, where, in his drunken condition, he might have been suffocated, had not a servant of the Earl's helped him out, which servant expressed, at the same time, his indignation at Bridgeton in these words, '*Sir, though you be a gentleman, you are uncivil:*' that Bridgeton walked off, turned about to the prisoner, and folding his arms across his breast, laughed him to scorn. The prisoner then, being recovered out of the kennel, drew his sword, and with a staggering pace advanced to Bridgeton, and made a push at him, when the Earl hastily turning about,

and pushing Bridgeton aside, received the fatal 1728-  
wound. ~~~~~

From this state of facts, the counsel for the prisoner proposed this defence, *1mo*, That killing is not murder, unless forethought malice against the person killed be either proved or presumed: that neither of these was the present case, for no antecedent malice was charged against the prisoner in the indictment, so could not be *proved*, and the circumstances of the fact excluded malice from being *presumed*; for it was charged that the push was aimed at Bridgeton, not at the deceased; consequently no malice could be presumed to be entertained by the prisoner, towards a person against whom the blow was not directed. *2do*, That the prisoner could not be more guilty in killing the Earl of Strathmore, by the thrust directed at Bridgeton, than in killing Bridgeton himself; yet such was the provocation given by him to the prisoner, that had Bridgeton been killed, 'it would have been constructed only 'as casual or culpable homicide.'

It was then contended for the prisoner, that killing in such circumstances was not capital by the divine law. The divine law was branched into two parts, the law of nature, and the law of Moses. By the law of nature, it was argued, every action must be construed according to the intention of the actor; and that the deed of a man, if not proceeding from his will, was not different in point of merit or demerit, from the act of an irrational creature, or from an effect produced by inanimate matter: that the prisoner obviously had no intention to kill the Earl of Strathmore, consequently he could have no crim-

1728 inality in having occasioned his death. According to the Mosaic law, it was contended, in a very prolix argument, that it was immaterial whether the mode of exempting from punishment be in form of absolving from trial, or of flying into a city of refuge, or other sanctuary; and that, by the law of Moses, the benefit of a city of refuge was hardly necessary in such a case as the prisoner's. By this law, the cities of refuge were appointed as an asylum to such as had killed a man without malice prepense, or, in the language of scripture, without hating him in time past, *i. e.* a hatred of three days standing. But that the *act* of killing *one*, when the *purpose* was to kill *another*, was a case not stated in holy writ.

Upon the *civil* or *common* law, various positions were maintained; *1mo*, That culpable homicide was not capitally punished; *2do*, That homicide committed upon such high provocation as was here given by Bridgeton to the prisoner, would, by that celebrated system, have been deemed only culpable homicide; *3tio*, That the prisoner's intention to kill not being pointed at the Earl of Strathmore, but the assault, of whatever nature, being directed against another, the death of the Earl occasioned by such assault could amount only to casual, or at most culpable homicide.

The counsel for the prisoner then successfully maintains, that, by the old statute law of Scotland, and particularly by James I. Parliament 3d, act 51. distinction is made between premeditated murder and killing of a sudden upon provocation, in the latter of which cases, the benefit of the sanctuary, which the church had obviously founded upon the



asylum of the cities of refuge, was allowed to the manslayer. And if, with the abolition of Popery, the privilege of the sanctuary was also abrogated, that to alter thereby, and to aggravate the civil punishment of crimes, must either have proceeded from an omission of the legislature, or the over great zeal of the times. 1728

An ingenious but more doubtful argument follows to show, that, by the act Charles II. Parliament 1. c. 22. 'for removing of all question and doubt that 'may hereafter arise in criminal pursuits for slaughter,' the *casual* homicide which was thereby declared to be exempted from capital punishment, did truly imply slaughter *not merely accidental*, but that which was *in some degree culpable*. It must indeed be confessed, that, considering the infinite importance of this statute to our lives and safeties, it is expressed in a scandalous degree of inaccuracy, obscurity, or absurdity; and that, with the rest of our penal laws, it requires a revisal and explanation.

The information next endeavours to obviate the cases in point adduced by the pursuer, to prove that no distinction was made by the Court between murder and manslaughter: and states on the other hand certain decisions to show, that a capital punishment was not applied in some cases which were '*neither merely casual nor in self-defence.*'

Finally, it maintained on behalf of the prisoner; 'that manslaughter is *in effect* not punishable at all 'in England,' and that culpable homicide only inferred an arbitrary punishment.

*The Lords pronounced the following judgement:—*

1728 ‘ Find, That the pannel having, *by premeditation and forethought felony*, with a sword or other mortal weapon, wounded the deceased Charles Earl of Strathmore, of which wound, he the said Earl soon thereafter died; or, that he the pannel was art and part thereof, relevant to infer the pains of law; but allow the pannel to prove all facts and circumstances he can, for taking off the aggravating circumstances of forethought and premeditation: also find, that the pannel, time and place foresaid, *having, with a sword or other weapon, wounded the said Earl, of which wound his Lordship soon died, or that the pannel was art and part thereof, separatim relevant to infer the pains of law; and repel the defences proposed for the pannel;* and remit him and the indictment, as found relevant, to the knowledge of an assize.’

### THE PROOF.

John Ferrier\* deposed, that, at the time and place libelled, he heard Bridgeton ask the prisoner if he would give his daughter to Lord Rosehill? to which he answered, No. Bridgeton then asked him if he would drink a bottle of wine, and drink *the*

\* The first witness who was examined in this cause, was Robert Hepburn, smith in Forfar. So little regard did the Court pay to the rules of law in receiving of evidence, so much did they seem bent against the prisoner, that they admitted this man a witness, although it was objected to him, and the objection clearly proved in Court, that, since his citation to be a witness, he said ‘ *That he thanked God he now had an opportunity to hang him (the prisoner) and would do it if he could.*’

*King's* health? and upon the prisoner's refusing, 1728  
Bridgeton took hold of him by the breast, and violently pushed him into the kennel, saying, 'Go and  
'be damned, and your King George whom you love  
'so well.' The kennel was deep and dirty, the prisoner was immersed into it, but not entirely covered; his face, however, when he came out of it, was almost as black as his coat. He was helped out of the gutter by a servant of Lord Strathmore's. Whenever he got upon the street, he drew his sword and run towards Bridgeton, who, upon seeing this, laid hold of Lord Strathmore's sword and endeavoured to pull it out. Lord Strathmore then turning about, pushed off Bridgeton, at whom in the mean time the prisoner made a thrust with his sword; Lord Strathmore at that instant was pushing Bridgeton aside and advancing to the prisoner, and the prisoner staggering forward, followed the thrust upon Lord Strathmore; then the company became so intermixed, that the deponent did not see where the thrust landed. Soon after he saw Mr. Thomas Lyon, his Lordship's brother, with his sword beat the prisoner's sword out of his hand, who run off staggering towards the Lady Auchterhouse's lodging, and had almost fallen before he got in at the gate, and about the same time the deponent saw the Earl fall down upon the street, and afterwards carried off.

William Douglass saw the prisoner falling backwards into a kennel, while nobody was near him but Bridgeton. When he got out of it, he drew his sword and approached to the groupe, of which Lord Strathmore and Bridgeton were part. At this time Bridgeton was standing between the Earl and the

1728 prisoner, 'but all of a sudden and a clap, the Earl  
~ 'came to be interposed between Bridgeton and the  
'pannel;' and at this time the prisoner was within  
sword's length of the place where Bridgeton had been  
standing. The deponent saw the prisoner make a  
thrust with his sword, and the Earl was then stand-  
ing next the prisoner with his face towards him.  
His Lordship received a wound in his belly, and when  
he was carried into a house and dressed, the depon-  
ent heard him say, that, after the sword entered his  
belly, the prisoner gave it a second thrust.

James Barrie, servant to the prisoner, saw his  
master and Bridgeton conversing together, but did  
not well hear what his master said. Bridgeton look-  
ed and spoke angrily, and with both his hands push-  
ed his master into the gutter, who fell upon his back,  
and was covered near over the belly. The deponent  
instantly quitted his horses and ran to his master's  
relief; but a servant of Lord Strathmore's helped him  
out before he came up. The prisoner then drew his  
sword, and with his face all bespattered with dirt,  
and the mire running out at the top of his boots,  
went pretty fast forward, staggering and saying,  
'this cannot be suffered.' On coming up to the  
company, he made a push at Bridgeton, who ere  
this had attempted to draw Lord Strathmore's sword;  
and, 'when his master made the push, he seemed as  
'if he had been falling, and saw him close upon  
'Lord Strathmore.' But his Lordship had put  
Bridgeton aside, and advanced half a step towards  
the prisoner, and, after this, they were so inter-  
mingled in a crowd that the deponent did not see  
what passed; only he saw his master's sword struck

out of his hand by another sword, who thereupon <sup>1728</sup> withdrew to his sister's lodging. Deposed, that his master was very drunk: that, about a month before, he heard the Earl invite the prisoner to his house, and the invitation was accepted; and, about eight days before this unlucky accident, the prisoner bid the deponent desire the tailor to get his clothes ready, for he intended to wait upon his Lordship at Glammiss, as soon as he had got his chaise home.

Margaret Carnegie, a witness cited for the prisoner, whose sister she was, deposed, that, on the afternoon of the day libelled, Lord Strathmore, Bridgeton, and the prisoner, paid her a visit. She observed no sort of difference between his Lordship and the prisoner; on the contrary, the latter, and the rest of the company, drank Lady Strathmore's health twice, and the prisoner tossed up his glass. Deposed, that Bridgeton was very rude to the prisoner, seized the deponent by the wrist, 'squeezed it hard, and 'said it would be no difficulty to break it.' At the same time he took the prisoner by the arm, struck his hand down to the table, and said, 'Will ye not 'agree to give one of your daughters to Rosehill\*?' and shook his hand over him.

Three witnesses swore, that, about two years ago, there had been some misunderstanding between the deceased Earl and the prisoner; but that they never heard him express a grudge or resentment against his Lordship. And a variety of witnesses deposed, that, on several recent occasions, they had heard the prisoner express great respect for the Earl; had seen

\* Lord Rosehill, eldest son to the Earl of Northesk.

1728 nothing but mutual civilities passing between them; and that the prisoner was a good tempered man, no-wise quarrelsome.

David Cauty, baillie of Forfar, deposed, that, on the night libelled, when he visited Finhaven in prison, he found him 'crying to a great extremity, as 'if he had been distracted, saying, it was the greatest misfortune that could happen him, and that he 'deserved to be hanged for wounding such a worthy 'Earl.' Deposed, that the prisoner was drunk; but regretted his misfortune as if he had been sober; and that, he said, his design was against Bridgeton.

Two physicians and two surgeons swore, that Lord Strathmore died of the wound about forty-nine hours after receiving it. Two of them deposed, that his Lordship told them he did not believe the prisoner intended the wound for him; yet there was one circumstance he could not account for, viz. that, after the sword 'had entered his body, Finhaven pressed 'it forward till their bodies were close together.'

*The Prisoner's Counsel change their ground.*

The defence hitherto proposed for the prisoner was, that the circumstances of the case considered, he was not guilty of murder, but of manslaughter. The Court over-ruled the defence; for they found, that the prisoner having, time and place foresaid, wounded the said Earl, of which wound his Lordship died, separatim relevant to infer the pains of law, and repelled the defences proposed. Now the killing was indisputable; therefore, if some other mode of defence was not adopted, the prisoner was gone.

Happily for the prisoner, and happily for the country, his counsel possessed spirit and abilities equal to the important task. Sprung of a family that seems to give to its descendants an hereditary title to great talents, he had the twofold merit of saving his client, and wrenching the rights of jurymen from the grasp of tyranny. 1728

He repeated and enforced to the jury the arguments stated to the Court, to show that the excessive provocation the prisoner had received, the suddenness of the fact, and the certainty of his having entertained no design to harm the Earl of Strathmore, rendered him excusable in having been the cause of his Lordship's death. He told them with a manly confidence, which conscious right inspired, that they must not be startled at the interlocutor of the Court. He unfolded the purpose and powers of a jury, which was simply, that no person should be subjected to a criminal sentence unless convicted by his peers; and that a jury which *convicted without being satisfied of the prisoner's guilt*, were themselves guilty of treachery and murder. He explained how the King's counsel, in the reigns of the Royal Brothers, by a mixture of imperious dictate, and sophistical argument, wrenched from weak jurymen, trembling under the rod of power, the privileges vested in them by the constitution: and the acrimony of his remark on those tools of despotism who undermined the privileges of assize, was in part directed at those timid jurymen who had afforded the repeated precedents which were now grounded upon, as forming a change in the law itself. He told them, that, by the stile of verdicts which had lately crept in, a jury by finding

1728 *proved*, instead of *guilty*, or *not guilty*, might surrender into the hands of the Court, perhaps also of the executioner, the life of a fellow-citizen, who they were convinced had killed the deceased in self-defence: and, in the most pathetic language, he deplored the fate of *Cumming*, who suffered by the hands of the executioner for a deed which the *jury found had been done in self-defence*. He maintained, that the judges, by finding *the killing at the time libelled relevant*, had manifested their opinion upon the point at issue, had testified their resolution, to condemn the prisoner, unless the jury should pronounce a verdict putting it out of their power: that the only object for their deliberation was, whether, in their own mind, the prisoner had committed *murder*, or whether his guilt was diminished or annihilated by the circumstances of the case. He insisted, that this was the critical moment which was either to rivet the prerogative of the Court over the privileges of a jury, or to emancipate them from the subordination and insignificance into which they had been degraded by a government, which finally was overturned on account of its reiterated attempts to overthrow every species of liberty civil and religious: and that the liberties of their country, the blood of the innocent, and their future peace of mind, depended upon the degree of justice and resolution which they should display in the verdict they were about to pronounce.\*

\* The late Lord Arniston, counsel for the prisoner, seldom prepared notes for his pleadings. Those which he made out in this cause are preserved; they are extremely short, consisting of



The jury, by plurality of voices,† found the prisoner 1728  
NOT GUILTY. ~~~~~

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*James Stewart in Aucharn, for the Murder of Colin  
Campbell of Glenure.*

THE prisoner was natural brother to Mr. Stewart 1752  
of Ardsheil, whose estate was forfeited on account ~~~~~  
of his being engaged in the late rebellion. He was  
brought to trial before the Circuit Court of Justici-  
ary at Inverary, upon the 21st of September, 1752,  
for the murder of Colin Campbell of Glenure, factor  
appointed by the Barons of Exchequer upon the for-  
feited estate of Ardsheil. The murder was perpe-  
trated upon Thursday the 14th of May preceding.

but a few sentences, containing the heads of his argument. The  
substance, however, of his speech to the jury in defence of the  
prisoner, is in some measure extant in the memory of his son, the  
Lord President, who has honoured me with the most useful and  
obliging communications in the course of this work.

† The jury divided twelve to three. The following persons  
found *not guilty*: Sir Robert Dickson of Inveresk, chancellor of  
the jury, George Loch of Drylaw, Walter Riddel of Granton,  
George Warrander of Bruntfield, Thomas Brown of Bonning-  
ton, James Balfour of Pilrig, Robert Dundas, David Inglis,  
David Baird, Alexander Blackwood, and John Steven, merch-  
ants, and James Ker, goldsmith, Edinburgh. The three who  
dissented, and protested against the verdict, were, John Watson  
of Muirhouse, George Haliburton of Fordel, clerk to the jury,  
and John Coutts, merchant, Edinburgh.

1752 Mr. Stewart was apprehended upon Saturday the 16th, committed prisoner to Fort-William, and kept there till the day of his trial in such rigorous confinement, that his friends, his wife and children, his agents, and counsel, were for the most part denied access to him. In the precognition that was taken concerning Glenure's murder, the prisoner's wife and children, contrary to the dictates of humanity, and rules of law, were repeatedly examined, upon oath, on every circumstance relative to them under alledged to have been perpetrated by their husband and father, and their depositions were adduced in evidence against him when he stood trial for his life. Archibald Duke of Argyle, Lord Justice General, with the Lords Elchies and Kilkerran, sat as judges: and in this case alone did a Lord Justice General, and a Lord Advocate, ever make their appearance at a circuit.

The indictment, which is very long, was raised at the instance of Mr. Grant of Prestongrange, his Majesty's Advocate, and of the widow and children of the deceased. Both the prisoner and Allan Breck Stewart were charged in it as guilty of the murder; Allan Breck as the actual murderer, and the prisoner as being *art and part*, or an accomplice. The former not appearing, sentence of outlawry was pronounced against him; the trial went on against the latter.—The indictment endeavoured, by a very long chain of circumstances, to fix down the guilt upon the prisoner. It set forth his having conceived a resentment against the deceased on account of his having, in quality of factor upon the forfeited estate of Ardshiel, turned the prisoner and other tenants out of their possessions: that the prisoner, in repeated

expressions, threatened vengeance against the deceased: that he conspired to murder him; and instigated Allan Breck Stewart, a man of desperate fortune, to this bloody enterprise: that Allan Breck did accordingly waylay the deceased, and murder him in the wood of Lettermore, in the afternoon of Thursday the 14th of May last, by shooting him through the body, so that he died upon the spot: that Allan Breck immediately absconded; and that the prisoner applied to his friends, and procured a little money, which he sent to Allan Breck at a place appointed, to enable him to make his escape.

The trial began by long pleadings upon the *relevancy of the indictment*, *i. e.* whether, upon such indictment, the prisoner could be brought to trial for life. These pleadings, on the part of the prisoner, were extremely ill-judged; for the only objection which they urged to the procedure of the trial, which in the least consisted with law or common sense, was, that Allan Breck, Stewart, the alledged actual murderer, ought be tried and convicted ere the prisoner could be tried as his accomplice. And the pleadings were attended with this bad consequence, that they afforded an opportunity to the counsel for the prosecutor to pre-judge the jury, by dressing up a tale of guilt; by making an artificial arrangement of circumstances tending to criminate the prisoner, which, without such artful display, could not have impressed a conviction of his guilt upon simple and impartial men; so that in a country where the minds of men were exasperated against each other by political resentments, family feuds, and a long train of mutual injuries, the jury might

1752 naturally confound the declamations of a lawyer  
 with the testimonies of a witness.\*

The harangues of the prosecutor's counsel were indeed remarkably violent and inflammatory. A chieftain, who has since relinquished the emoluments of the bar for the laurels of the field; who was reclaimed from the paths of rebellion (the error of his juvenile days) to the service of his country, was deterred by no motives of delicacy from appearing in this cause, and expiating his former offences against government by the zeal of his new-born affection. After expatiating on the danger to individuals, if the crime of assassination was to go unpunished, he proceeded thus: 'But what, I hope, my Lord, we all hold of greater importance than the safety of individuals; the interest, the honour, of this country is very nearly concerned, not to suffer the most daring and bare-faced insult to be offered to his Majesty's authority and government; and offered at a time when we, in common with his Majesty's other subjects, are reaping the fruits of his most benign reign. I say, my Lord, our interest, our honour, is concerned, not to suffer this, without endeavouring to wipe off the stain from

\* The following persons sat upon the jury: Colin Campbell of Carwhin, Dougal Macdougall of Gallanah, Alexander Duncanson of Kiles, Duncan Campbell of South-hall, Hector Macneil of Ardmeanish, James Campbell late baillie of Inverary, James Campbell of Rasheilly, James Campbell of Rudale, Colin Gillespie of Balimore, Colin Campbell of Skipnish, chancellor of the jury, Duncan Campbell of Glendaroul, Colin Campbell of Ederline, Niel Campbell of Duntroon, Archibald Campbell of Dale, and Neil Campbell of Dunstaffnish.

‘ the country, to shew the King, and to shew the 1752  
 ‘ world, that this is the bloody deed of one or two ~~~~~  
 ‘ wicked and desperate men; a deed which the  
 ‘ country abhors, and which it will not suffer to go  
 ‘ unpunished.’

A counsel who followed upon the same side, spoke out yet more explicitly the motives to this prosecution. He treats of the prisoner’s character in these words:  
 ‘ I will not say that his character in private life concurs against him; I have no authority from my  
 ‘ employers to assert it; nor will I assert what is not  
 ‘ supported by evidence: but I must say, that *his family and connections, his character and conduct in public life, are so many circumstances forming a presumption almost equal to a proof, in support of the charge brought against him: these are the most powerful adversaries he has to struggle with, and from them that general opinion of his guilt has taken its rise.*’

The argument on the relevancy being finished, the Court pronounced the only interlocutor which I apprehend they could do according to law: ‘ Repel  
 ‘ the objections to the libel, and find the libel relevant to infer the pains of law: that, time and  
 ‘ place libelled, the deceased Colin Campbell of Glenure was murdered, and that the pannel, James  
 ‘ Stewart, was guilty actor, or art and part thereof;  
 ‘ but allow the pannel to prove all facts and circumstances that may tend to exculpate him; and remit  
 ‘ the pannel, with the libel, as found relevant, to the knowledge of an assize.’

## THE PROOF.

Mungo Campbell, writer in Edinburgh, deposed, that he set out from Edinburgh on the 7th of May last, in company with the deceased Mr. Campbell of Glenure, to assist him in ejecting some of the tenants upon the fortified estates of Ardsheel and Lochiel, over which the deceased was factor; which tenants, it was apprehended, would not remove till legally ejected: that they went to Fort-William; and, in their return, they arrived on Thursday the 14th of May at the ferry of Ballachelish, purposing next day to eject some of the tenants of Ardsheel. The deceased, after waiting about an hour, and communing with some of the tenants, crossed the ferry between four and five in the afternoon. Glenure and the deponent entered the wood of Lettermore, and coming to a part where the wood was pretty thick upon both sides, so that the murderer could have easily concealed himself in the bushes, and where the road was so rough and narrow that they could not ride conveniently two horses a-breast, the deponent went foremost, and might have been about twice the length of the court-room before the deceased, when he heard a shot behind him, and heard Glenure repeatedly cry out, ‘ Oh! I am dead.’ The deponent immediately returned to Glenure, alighted from his horse, and also took the deceased off his horse; then run up the hill from the road to see who had shot him. He saw, at some distance, ‘ a man with a short dark coloured coat, and a gun in his hand, going away from him;’ and there was so great a distance between them, that the deponent

thinks he could not have known him although he <sup>1752</sup> had seen his face. As the deponent came nearer, he mended his pace, and disappeared by high ground being interjected between them. After Glenure was taken from his horse, he leaned a while upon the deponent's shoulder, endeavoured to open his breast to see where the bullets with which he was shot came out of his body, and was not able; but there were two holes in his waistcoat, over the belly, where the bullets had come out. After continuing upwards of half an hour in agonies, Glenure expired. Deposed, That there are places in the wood so situated, that a person standing there might see most part of the road from the ferry to the wood, and even part of the road from the ferry to Fort-William, some of which places are not a musket shot from the place where Glenure was murdered.

John Mackenzie, servant to Glenure, deposed, that, on the 14th of May last, when he was riding about a gun-shot behind his master in the wood of Lettermore, he heard a shot, which he took to be the report of a musket. It neither alarmed him, nor did he know whence it came; but, when he came up, he saw the preceding witness wringing his hands; and his master lying on the ground with a great deal of blood about him, just breathing, and not able to speak. The deponent was desired by the preceding witness to go in quest of Mr. Campbell of Ballieveolan and his sons, inform them of what had happened, and entreat them to come immediately to the spot where the deceased lay. He was directed by a neighbouring tenant to go to the house of James Stewart, the prisoner, in expectation that he would learn from

1752 him where Ballieveolan was. The prisoner seeing the deponent weeping, inquired what the matter was? the deponent told him his master was killed; upon which the prisoner asked him by whom, and how it was done? to which he answered, he did not know by whom, and believed it to be by a shot from a gun or pistol. The prisoner wrung his hands, expressed great concern at what had happened, as it might bring innocent people to trouble, which he prayed might not be the case. Deposed, That, when his master and he were about three miles on their way coming from Fort-William, the day of the murder, they met John Beg Maccoll, a servant of the prisoner's, going there, and that Maccoll had performed his journey, and returned to the ferry of Ballachelish about the same time with the deponent, his master and he having stopped about an hour and a half, or two hours, on the road: that Maccoll was impatient to be ferried over, and did cross the ferry about half an hour before Glenure.

Donald Kennedy, sheriff-officer, deposed, that when Glenure and his company were at the ferry of Ballachelish, the deponent saw John Maccoll, the prisoner's servant, who seemed to be in a hurry to cross the ferry; Glenure said to him, 'Sir, you travel better than I do.' To which he answered, 'I am in a haste;' and so went over the ferry about an hour before Glenure crossed it. The deponent, who was in company with Glenure, for the purpose of executing the warrant of ejectment, crossed the ferry along with him, and went on before. When he had got about half a mile into the wood of Lettermore, he heard a shot, which he did not regard, till hear-



ing Mungo Campbell make a great noise, like one 1752 weeping, he returned, and Mungo said to him, ' the ' villain has killed my dear uncle; adding, *that he had only seen one man*; and that he, the deponent, asked no questions, being in confusion, and dreading the same fate himself.' Deposed, that, some time after, when the people were gathered about the corpse, John Maccoll was among them.

John Roy Livingstone deposed, That, on Thursday the 14th of May last, he saw Allan Breck Stewart in Ballachelish in the forenoon, dressed in a dun coloured great coat. In the evening, he saw John Maccoll, the prisoner's servant, travelling at a good rate from the ferry of Ballachelish to his master's house. The deponent joined him, asked where he had been? and got for answer, at Maryburgh (the village of Fort-William) for Charles Stewart, notary public. Maccoll farther told him, that Glenure was to be that night at Kintalline. About two hours after, the deponent, who was then in the wood of Lettermore, heard a shot, and on going up found that Glenure was murdered.

Duncan Campbell, *change-keeper*\* at Annat, deposed, That one day in April last, when Allan Breck Stewart was in his house, Allan said, that *he hated all the name of Campbell*; and bid the deponent, if he had any respect for his friends, tell them, that, if they offered to turn out the possessors of Ardsheil's estate, he would make black cocks of them; which the deponent understood to mean, that he would shoot them. Allan Breck said, that he had another

\* Keeper of an ale-house.

1752 quarrel with Glenure besides his turning the people  
of Ardsheil out of their possessions, viz. his writing  
to Colonel Crawford, informing that Allan Breck  
was come from France,† but that he was too cunning  
for Glenure; for that, when at Edinburgh, he had  
made up his peace with General Churchill, and got  
a pass. Deposed, that Allan Breck said twenty  
times he would be upsides with Glenure, and want-  
ed nothing more than to meet him at a convenient  
place: that Allan Breck was not drunk, *for he could  
walk and talk as well as any man*; but it could easily  
be observed he had been drinking.

Robert Stewart deposed, That, some time in April  
last, he was in company with Allan Breck and the  
preceding witness. Allan complained much of Glen-  
ure's and Mr. Campbell of Ballieveolan's conduct to-  
wards him, and particularly of Glenure's sending no-  
tice to Fort-William of his being in the country, so  
that he might be apprehended: but he would be up-  
sides with him; and take an opportunity to dispatch  
either him or Ballieveolan before leaving the coun-  
try. Allan Breck was much in drink when he ut-  
tered these expressions.

Malcolm Bane Maccoll, change-keeper at Portna-  
crosh, deposed, That, in April last, Allan Breck  
Stewart, and John Stewart in Auchnacran, sat up all  
night in his house drinking. Next morning, John  
Maccoll, servant to the deponent, came into the  
room in a shabby condition. Allan Breck asked who  
he was? John Stewart answered, an honest poor man

† Allan Breck Stewart had deserted from one of the British  
regiments of foot after the battle of Preston, joined the rebels  
and afterwards enlisted in the French service.

with a numerous family of children, and it would be great charity in any body to assist him: upon this Allan Breck desired John Stewart to give him a stone of meal and he would pay for it. He then gave Maccoll a dram, and said, ‘ *If he would fetch him the red fox’s skin, he would give him what was much better*; to which the said John Maccoll answered, that ‘ *he was no sportsman, and that he was much better skilled in ploughing or delving.*’ The deponent took little notice of these expressions at the time; but, after hearing of Glenure’s murder, he believed that Allan Breck meant Glenure, as he was commonly called *Colin Roy*, i. e. *Red Colin*. 1752

John Stewart of Fasnacloich deposed, That he told Allan Breck that Glenure was come from Edinburgh to remove the tenants; to which Allan Breck answered, if he had a warrant there was no more to be said; but, if he had not a warrant, he would not be allowed to remove them.

John Stewart, son to the preceding witness, deposed, That, Allan Breck, after a visit of three days at his father’s house, left it on the morning of Monday the 11th of May. He was then dressed in a long blue coat, red waistcoat, and black breeches, and had a feather in his hat; but, when the deponent met him next day at Ballachelish, he was dressed in a black short coat, with round white buttons, with a dark great coat over it; and he had on trousers and a blue bonnet. The deponent observed to Allan, that he had changed his dress, who answered, he did it because the day was warm.— John Stewart younger of Ballachelish swore, That he saw Allan Breck at the deponent’s father’s house

1752 on Tuesday the 12th of May last, and heard him ask questions about Glenure's travelling to Lochaber.

Catherine Maccoll, servant to the prisoner, deposed, That, on the afternoon of Monday the 11th of May, Allan Breck Stewart came to the prisoner's house dressed in a long blue coat, red waistcoat, and black breeches; but the prisoner was from home, having gone to Keels to meet Mr. Campbell of Airds, and it was late at night before he returned: the family waited supper on him; and he supped in company with the said Allan Breck, a daughter and a nephew of the laird of Fasnacloich, and the prisoner's own family. Allan Breck did not lie all night in the house, but in a barn\*; and next morning left her master's house. Allan Breck, when he left the house, had on a dun coloured great coat. On the evening of Friday the 15th of May, she saw Mrs. Stewart, the prisoner's wife, put into a sack a long blue coat and a red waistcoat, which she took to be Allan Breck's clothes, and was desired by her to hide them without the house, which was done accordingly. On Saturday evening her mistress desired her to go for what she had hid, and leave it at the back of the brewhouse; she did this also; and has not seen the clothes since.

Archibald Cameron deposed, That, on Monday

\* This was nothing uncommon among the yeomanry in the Highlands of Scotland. In that hospitable country, such troops of visitors are entertained as would derange the economy of a more polished people. When they go to rest, they are never incommoded for want of lodging; as sheets and blankets spread on heath, in a barn, form supplementary beds for such of the guests as the house cannot contain.

the 11th of May, he came to the house of the prisoner, who was not then at home, but arrived before night-fall. Allan Breck came there a little after the deponent. The prisoner and his family, Allan Breck, and the deponent, sat in one room, and supped together: and he did not observe Allan Breck and the prisoner speak in private that night. The deponent, and Allan Stewart, a son of the prisoner's, lay in one bed, and Allan Breck and Charles Stewart, also a son of the prisoner's, lay in another bed in the same barn. They all went to bed much about one time, and rose together next morning; and the deponent did not see the prisoner about the house.

Alexander Stewart of Ballachelish deposed, That Allan Breck came to his house in the afternoon of Wednesday the 13th of May, and staid with him till next day between eleven and twelve o'clock, when he went a-fishing in a neighbouring rivulet, and did not take leave of the deponent, since which time he has not seen him. As the murder happened that night, and as Allan Breck did not return to the deponent's house, he next morning 'really thought 'that Allan Breck Stewart might be *the actor*\* in 'this murder.' Allan Breck was dressed in a great coat, and under it a short black coat with white buttons.

\* This expression appears to me equivocal and suspicious. It must here be observed, that the common method of taking down written evidence in this country, is not to express the actual words of the witness, but for the judge, or commissioner, to clothe the witness's ideas in the most suitable language that occurs to him. Thus the witness's ideas, when committed to paper by the judge is sometimes very different from that which he delivered.—The

1752 Donald Stewart in Ballachelish deposed, That, on Friday the 15th of May, he met the prisoner, and, upon expressing his regret at Glenure's murder, the prisoner joined with him; and added, that one Serjeant More, who, to the deponent's knowledge, had not been in the country these ten years, had threatened harm to Glenure in France. On the preceding evening the deponent received a message, that a person at a little distance from the house wished to see him. He went, and found it to be Allan Breck Stewart, dressed in a great coat, and a dark short coat under it, with white metal buttons. The deponent challenged him as guilty of the murder; he said he had no concern in it, but believed he would be suspected; and on this account, and being a deserter, it was necessary for him to leave the kingdom: and therefore, as he was very scarce of money, he requested the deponent to go to the prisoner, and acquaint him, that he Allan Breck was gone to Koalishnacooan, and desire him, if possible, to send him money there. The deponent promised to deliver the message, and did deliver it to the prisoner, who, without saying whether he was to send the money or not, asked why Allan Breck himself did not come for money if he wanted it? to which the deponent answered, that Allan told him he would be suspected of the murder, and was a desert-

judge who dictated to the clerk of court Mr. Stewart of Ballachelish's evidence was the Duke of Argyle himself. I apprehend the deponent meant only, that he really thought Allan Breck might be *guilty* of this murder; yet his evidence is so worded as to imply, that the actual *perpetrator* was not without *conspirators*, who were joined with him in contriving this murder.

er. The prisoner replied he hoped in God Allan Breck was not guilty of the murder. On the Sunday after, the deponent met Alexander Bane Stewart packman\*, who told him he had been at the prisoner's house of Aucharn, and had got either three or five guineas, to be left with John Breck Maccoll in Koalinsnacoan, for Allan Breck's use, if he called there.

John Macdonald of Glenco deposed, That, on Friday the 15th of May, Allan Breck came to the deponent's house between three and four in the morning, when the family were all in bed, knocked at the window, and did not stay above a quarter of an hour, and gave him the first notice of Glenure's being murdered the evening before in the wood of Lettermore. Allan Breck said he was going to leave the country, and had come to bid him farewell.

Mary Macdonald deposed, That, on Sunday the 17th of May, a little before sun-set, she saw Allan Breck sitting in the wood of Koalinsnacoan. On her approach he started to his feet; the common salutation passed between them; but she was alarmed at meeting a man in a place so remote.

Allan Beg Cameron deposed, That, about the 18th of May last, Allan Breck Stewart, his nephew, having come to his house, the deponent said, he supposed Allan would be suspected of the murder, who answered, he thought so too. The deponent pressing him earnestly to 'make a clean breast,' he declared he had never seen Glenure dead or alive. The deponent repeated his instances with him to tell what

\* Fedlar.

1752 he knew of the murder, till at last he became angry.  
 ~ Allan Breck added, that his only fear was to be apprehended by the military, which might prove fatal to him, as he had been a deserter; and that Glenure's friends were at present in such rage and fury, that he was very sure, were he apprehended, he would be hanged.

Alexander Stewart of Innerhayle deposed, That the prisoner was many years tenant to his brother, the Laird of Ardsheil, upon the farm of Glenduror: that he was removed from his possession by Glenure, factor upon this forfeited estate, and the lands given to Mr. Campbell of Ballieveolan. The deponent being a near neighbour of the prisoner's, had frequent opportunities of conversing with him on the subject of his removal. The prisoner seemed dissatisfied with it; adding, however, that he did not think Glenure would have removed him, if Mr. Campbell of Ballieveolan had not sought these lands from him. Deposed, that the chief regret which the prisoner expressed for being turned out of his farm, was, that the children of the family of Ardsheil would thereby be deprived of the gratuity he was wont to transmit them. Deposed, *That the prisoner removed voluntarily from the farm of Glenduror, without process at law.*

Donald Campbell of Airds deposed, That he was employed by Glenure as his sub-factor upon the estate of Ardsheil. The prisoner told the deponent, that whatever was made of these rents over what was paid into the Exchequer, was accounted for to the children of Ardsheil; and, when the prisoner removed from the farm of Glenduror, he said to the de-



ponent, he had reason to believe the excrescence of 1752 the rents of that farm would still be accounted for to them; and, in that case, he would be easy as to his own removal.

Charles Stewart, writer and notary, deposed, That the prisoner wrote him a letter, desiring him to go along with the tenants of Ardsheil, and intimate to Glenure a sist which had been obtained upon a bill of suspension against their removing. The deponent accordingly went to Aucharn that night; and next day, which was the first of May, he went along with the tenants to Glenure's house, intimated the sist, and took a protest. The prisoner did not go along with him. On the 14th of May he got a second letter from the prisoner, desiring him to attend next day at the *ejection of the tenants*, but he declined going, because he did not choose to disoblige Glenure. When the deponent was at Aucharn on the first of May, he saw Allan Breck Stewart there, who was dressed in a short black Highland coat, with white buttons, and trowsers. He then heard Allan Breck say, that he thought it hard in Glenure to remove the tenants of Ardsheil, when he did not remove those of Mamore.

John M'Corquodale in Ballachelish, deposed, That, on the last night of December, he was present at Kintalline when Glenure, the prisoner, and some other company, met together: high words passed between them; and it being apprehended a quarrel would ensue, the deponent and some others took the prisoner out of the room. The prisoner was disoblige at being separated from Glenure, as he expected he would have gone home with him that

1752 night to the prisoner's house; and said, if nobody *had interfered, Glenure and he would have been good friends before they parted.*

Alexander Campbell in Teynaluib, deposed, That, in the end of April, the prisoner stopped at his house to get his horse fed. He called for a dram; and one Maclaren, a merchant in Stirling, asked the prisoner to help the deponent to a dram; to which the prisoner answered, '*he did not know any thing he would help the deponent, or any of his name, to, if it was not to the gibbet.*' The deponent replied, saying, it seems if any of the Campbells were at the gallows, the prisoner would draw down their feet; to which the latter rejoined, those '*of some of them he would, and of some of them he would not.*' The deponent then said, he supposed Glenure was the man of the name with whom the prisoner had the greatest quarrel, but he had no good cause for it; to which the prisoner answered, if Glenure had used the deponent as ill as him, by turning the deponent out of his possession, he would have had no less quarrel with Glenure than the prisoner had. Being interrogated for the prisoner, deposed, That the prisoner was perfectly sober, and the deponent thought these expressions proceeded from malice.

Colin Maclaren, merchant in Stirling, deposed, That, upon his desiring the prisoner to help their landlord, the preceding witness, to a dram, the prisoner said, he did not think he would help the landlord, or any of his name, to any thing but the gallows. The landlord then said, '*That it seemed if they were on the gibbet the pannel would draw down their feet; and he supposed it was on Glen-*

'ure's account;' to this the prisoner answered, he 1752  
could not say but it was; upon which an altercation  
took place between the preceding witness and the  
prisoner concerning the justice of the latter's being  
removed from his farm. The deponent and the pri-  
soner rode on together from the house of the preced-  
ing witness; the conversation was renewed, the pri-  
soner seeming to have much at heart the removal  
from his possessions. He said, he did not know what  
business either the Barons of Exchequer, or factors  
upon the forfeited estates, had to turn out tenants  
while they paid their rent: that he was going to  
Edinburgh to apply for a bill of suspension against  
the removing; if he failed in his suspension, he would  
carry it to the British Parliament; and if he failed  
there . . . (after a little pause, and with an emphasis)  
. . . *'he behoved to take the only other remedy that re-  
'mained.'* Being interrogated for the prisoner, de-  
posed, That, when the conversation began in the  
house of the preceding witness, he thought the pri-  
soner in jest; but it was like to turn out very seri-  
ous, as the prisoner and the landlord came to high  
words. The witness did not think the prisoner  
drunk while in the preceding witness's house, but  
some drams were drank upon the road, and the de-  
ponent thought the prisoner much the worse of  
drink when he used the above expressions about the  
British Parliament, and the only other remedy.—  
Deposed, That the conversation turning upon an of-  
ficer who was broke for cowardice, the deponent  
said it surprised him much, for he knew that this  
officer accepted of a challenge to fight from Glenure.  
The prisoner said, he esteemed that officer a better

1752 *man* than Glenure; one Murray who was in company having contradicted the officer's being so good a man as Glenure, the prisoner said, 'he knew the contrary; for that he himself had given Glenure a challenge to fight him, which Glenure declined;' and he desired Mr. Murray to tell Glenure, '*he would fight him when he would;*' but Mr. Murray declined to carry such a message.

Ewan Murray, vintner, deposed, That the prisoner, and Mr. Maclaren, the preceding witness, having stopped at his house, the conversation turned upon an officer of the army who was branded with cowardice, and the prisoner said, Glenure was as great a coward as that officer, for the prisoner had challenged him to fight, which Glenure declined; and he desired the deponent to tell Glenure so; but the witness said, he would not carry any such message from one gentleman to another.—At that time he thought the prisoner the worse of drink.

John More Maccoll, late servant to the prisoner, deposed, That, about Christmas last, as the deponent, and other servants of the prisoner's, were distilling some whisky in their master's brewhouse, after some previous conversation concerning Glenure, the prisoner said, 'the tenants, or commoners, were likely to be very ill off; for, if Glenure went on in the way he then did, it was likely he would be laird of Appin in a very short time; and that he (the deponent) *knew once a set of commoners in Appin who would not allow Glenure to go on at such a rate;* to which the deponent and the rest answered, that they knew no commoners in the country that could strive or contend with Glenure.' Deposed, That,

on the day the prisoner went last for Edinburgh, 1752 Allan Breck Stewart said to the deponent and Dugald Maccoll, that 'if they, the commoners, were 'worth themselves, they could keep out Glenure, 'and hinder him from oppressing the tenants, in 'which case they would not be banished from their 'natural possessions.' Allan Breck added, that 'he 'had it in his power to save or protect any body that 'would put Glenure from trampling upon the coun- 'try in the manner he then did.'

Dugald Maccoll, servant to the prisoner, deposed, That one morning last winter, when the deponent and other servants were in the prisoner's brewhouse, he said to them, that Glenure was like to hurt him, the prisoner, as much as in his power; but that was not the worst of it; for, if Glenure proceeded in his present stile, it was probable he would be laird of Appin in five years: the deponent and the other servants said it was so; upon which the prisoner observed, 'that was the fault of the commoners;' and added, 'that he once knew commoners in Appin who 'would not allow Glenure to go on at such a rate.' Deposed, That, on the last night of December, Glenure, Mr. Campbell of Ballicaveolan, the prisoner, his uncle James Stewart in Ardnamurchan, and John Stewart younger of Ballachelish, were in company together at a public house at Kintalline: the deponent, by desire of his mistress, went there to attend his master home. The company continued drinking till it was late at night: they began to speak very loud, and got upon their feet; but, as they spoke in English, the deponent did not understand what they said; he, and several 'other commoners' who were in

1752 the house, apprehending that the forementioned company were about to quarrel, went into the room in order to prevent it. As the company still spoke loud, and in English, the deponent and his assistants carried the prisoner, and his uncle, Mr. Stewart, out of the room. They insisted on going back to the company; and the prisoner would not move from the place where he stood till a message was brought him from the company, signifying whether Glenure would wait upon him at his house next day. Being informed by Mr. Stewart of Ballachelish that Glenure would wait upon him, the prisoner asked, 'if Glenure had promised so upon his honour,' and was answered in the affirmative; and Glenure and Ballie-veolan did accordingly dine at the prisoner's house next day. Deposed, That the deponent and his assistants then carried the prisoner over a rivulet which lay between the house where they had been drinking and the prisoner's house at Aucharn. He asked at them 'what kept them there so late, and why they did not go home in proper time of night?' and they answering that they were there waiting upon him, 'the pannel replied, that *it was not waiting upon him they were but upon Glenure, to see what they could get by him.*' Deposed, That both the prisoner and his uncle were very drunk. Deposed, That, in March last, when the deponent and John More Maccoll were harrowing one of the prisoner's fields, Allan Breck Stewart and they fell into conversation about their exiled friends in France: Allan Breck said, it was a particular misfortune that the management of any concerns they left behind them should have fallen into the hands of Glenure, who was about to show

them no manner of favour. He said, 'the common- 1752  
'ers of Appin were little worth when they did not  
'take him out of the way before now;' and upon  
their saying nobody would run that risk, Allan answered, that he knew how to convey out of the way any body who would do so, in such manner that they should never be caught. He added, that they and the tribe of Maccoll were not like to be the least sufferers by Glenure's proceedings. He was then dressed in a long blue coat, red waistcoat, and black breeches, with a hat and feather; but, when he went from the prisoner's house to Rannoch, he was dressed in a black short coat with silver buttons, belonging to the prisoner, blue and white striped trowsers, and a dun great coat, which the deponent thinks belonged to Allan Stewart, the prisoner's son. Allan Breck had on the same dress when he came from Rannoch; and the deponent does not remember to have seen him in that garb at any other time, except on the 11th and 12th of May last. Deposed, That, on Friday the 15th of May, the deponent saw Catherine Maccoll, servant to the prisoner, have something in a bag under her arm, which she said was Allan Breck's clothes, and that she was going to hide them. Deposed, 'That, upon Thursday evening, the 14th  
'of May, after notice of Glenure's murder came to  
'Aucharn, Allan Stewart, son to the pannel, desired  
'the deponent and John Beg Maccoll, to hide a large  
'Spanish gun that used to stand in the brewhouse;  
'and told them that he himself had concealed a lesser  
'gun that used to stand at the end of the *girnel*\* in

\* A meal-ark, or corn chest.

1752 the barn, under the said *girnel*, where he thought 'it would be safe.' They did so accordingly; but next day the prisoner, not thinking the place where the arms were concealed sufficiently secret\*, ordered the deponent and John Beg Maccoll to carry them from the place where they were hid, and hide them in the moor; and they accordingly lodged them in the cleft of a rock. Deposed, That the arms so hid, were a large Spanish gun loaded with powder and *small shot*, which Allan Breck was in use to carry in order to shoot black cocks; a small gun not loaded, which Allan Stewart, the prisoner's son, was in use to carry in the morning for the same purpose, and four swords. Deposed, That before the arms were thus hid, it was reported at Aucharn that soldiers were coming into the country.

John Beg Maccoll, servant to the prisoner, deposed in substance conform to the two preceding witnesses, as to the prisoner's complaining to them that Glenure was no friend of his, and that he once knew a set of commoners in Appin, who would not allow Glenure to carry matters with so high a hand. Deposed, That the deponent and Dugald Maccoll communed together on the import of their master's expressions, revolving whether it was an encouragement to destroy Glenure, or a complaint against the commoners of Appin, as not being so faithful to the prisoner as he expected. Deposed, That Allan

\* The statute of King George I. for disarming the northern counties, had been lately renewed with additional severities. Arms being found in the possession of persons of a certain description, subjected the possessors to heavy penalties; Stat. Geo.1. ann. 1mo, cap. 54.; Geo. 2di. ann. 19no, cap. 39.



Breck came to the prisoner's house in March last, 1752 staid there for some days, made little excursions in the neighbourhood, and came frequently back again. In particular, he came to Aucharn on Monday the 11th of May about mid-day, dressed in a long blue coat, red waistcoat, black plush breeches, hat and feather; but in the evening he was dressed in a black short coat and silver buttons, belonging either to the prisoner or his son; and he, Allan Breck, thus dressed, came and assisted the deponent, and his fellow servants, *in covering potatoes*. When Allan Breck arrived at Aucharn on the 11th of May, the prisoner was seeing the deponent and his other servants covering potatoes. Allan Breck seated himself beside the prisoner, and they had some conversation in English, which the deponent does not understand. Deposed, That, on Thursday the 14th of May, the prisoner gave the deponent a letter to be delivered to Charles Stewart notary public at Maryburgh, and told him that the purpose of the letter was to desire Charles Stewart to come and take a protest against Glenure, in case he had no sufficient warrant to remove the tenants of Ardsheil. The prisoner desired the deponent to make all possible dispatch, and to go by the ferry of Kintalline, being a shorter way than by the ferry of Ballachelish. The prisoner also told him to get some money from William Stewart merchant Maryburgh, to pay for milk cows which were bought for him, and that, if the money was not sent, he would not get the cows. The deponent set out from Aucharn between seven and eight in the morning. He met Glenure at the three mile water, knew his servant, had some con-

1752        versation with him, and told him, that he, the deponent, was going to Fort-William; and he arrived there about twelve o'clock. He delivered the letter he got from the prisoner to William Stewart merchant in Maryburgh, who told him, that Charles Stewart, the notary, was from home, having gone to the Braes of Lochaber; but that Glenure had a notary with him, which would answer the purpose of both. The deponent got no money from William Stewart, staid a very little while at Fort-William, returned by the ~~short~~ road to the ferry of Ballachelish, and found Glenure arrived at the ferry before him. The deponent wanted to cross immediately; the ferryman bid him wait till he should be taken over with Glenure's horses; but the deponent observing that the time of the tide, and the rapidity of the stream, would occasion a considerable delay ere the horses could be taken over, made the ferryman cross with him immediately; and this was about four o'clock. The deponent proceeded in his journey, passed through the wood of Lettermore, and neither met nor saw any body; and when he went that day to Fort-William with the letter to the notary, *he had no orders from his master to inquire after Glenure's motions, or to acquaint any body with them.* An hour was hardly elapsed after the deponent's arrival at his master's house, ere Glenure's servant came to the door calling for the prisoner; and being asked what news? he answered, ' the worst I ever had; my master is murdered in the wood of Lettermore; upon which James Stewart said, Lord bless me, was he shot? to which the servant answered, that he was shot; and said the pannel ought to go and take

‘care of his corpse.’ But neither the prisoner, nor 1752  
any of his family, went near the corpse; for he said,  
‘that, as he and Glenure were not in good terms,  
and some of the people who were to meet Glenure  
had arms, he did not incline to go near them, not  
knowing what might happen.’ The prisoner said,  
‘this was a dreadful accident, and he was afraid would  
‘bring trouble on the country;’ and appeared to be  
sorry for what had happened. Deposed, That, late  
on Thursday evening, after the news of Glenure’s  
murder had arrived at Aucharn, the prisoner’s wife  
ordered Dugald Maccoll and the deponent to hide all  
the arms that were about the house, as it was pro-  
bable that a party of soldiers would be ordered into  
the country. They accordingly took a large loaded  
gun out of the brewhouse, and hid it under the  
thatch of the sheep-house. They inquired, at the  
same time, for the little gun that used to lie in the  
barn, and were told by Allan Stewart, the prisoner’s  
son, that he had hid it under the large *girnel*; and  
they concealed four swords under a parcel of thatch.  
Next day they were desired by their mistress to hide  
the arms better; and they took the large loaded gun  
and the swords from the places where they had con-  
cealed them, and the little gun, which was not load-  
ed, from under the *girnel*, where Allan Stewart said  
the night before he had laid it, and hid all of them  
at some distance from the house. Deposed, That  
he saw the little gun either on the Tuesday or Wed-  
nesday preceding the murder, and gave as the cause  
of his not seeing it on Thursday, ‘that he was from  
‘home almost all that day.’ He did not see the little  
gun loaded since the month of March, when the

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1752 black cocks were crowding. At that time he saw Allan Breck carry it one morning loaded with small shot, who told the deponent that it missed fire thrice when he presented it at a black cock, and went off the fourth time without killing the bird. Deposed, That neither of the guns were in good order; for the large one, when the trigger was drawn, used to stand at half cock, and the little one had an old worn flint, and was in use to miss fire.

Captain David Chapeau of General Pulteney's regiment deposed, That, upon information given by Mr. Campbell of Barcaldine, that there were some arms hid among the rocks near the prisoner's house, he went thither with a party of his men, and found the arms above described. The large gun was loaded with small shot; the little gun was not loaded, and appeared to have been lately fired; for he put his finger into the muzzle, and it came out black. Being interrogated by the prisoner, whether a musket laid by foul will not give that appearance to the finger a month after it has been discharged? deposed, he cannot tell, not being accustomed to see arms used so. Deposed, That the lock of the unloaded piece had but one screw nail, and the other end of the lock was tied to the stock with a string: That a gun in such a situation may be fit enough to be 'fired with:' That he took the fuzees along with him to Fort-William, and delivered them to the adjutant; and the deponent does not know by what means the lock now missing, which belonged to the little gun, was lost, but believes it to have been by accident.

William Stewart merchant in Maryburgh deposed,

That he did not send to the prisoner the £8 to pay <sup>1752</sup> for the cows, which John Beg Maccoll sought in the prisoner's name on Thursday the 14th of May; but, on Friday the 15th, he got a second message by Alexander Stewart, packman, who told the deponent that he was going to Glenevis to get payment of a horse bought from the deponent, and that he must also get from the deponent £5 towards payment of some cows which the prisoner had bought for him at Ardsheil, as the cows were not to be delivered till payment of the money. The deponent, however was not in cash; but next day, as the pedlar returned from Glenevis, the deponent's wife, who was anxious to have the cows, sent three guineas by the pedlar to the prisoner, and, accordingly, in about eight days, she got two of the cows, but she never got the other two. Deposed, That he saw Allan Breck at the prisoner's on the 1st of May, dressed in a short black coat and clear buttons. Allan Breck told the deponent he had been a soldier in the King's troops at the battle of Preston, and afterwards was in the rebellion; and he seemed to be on the watch lest he should be searched for.

Alexander Stewart, travelling packman, deposed, That, upon Friday the 15th of May, about mid-day, the prisoner desired the deponent to go to Fort-William to William Stewart merchant, and get £5 from him; for the prisoner's friend, Allan Breck, was about to leave the country, as troops were coming into it, and he might be suspected of Glenure's murder. The prisoner said it was incumbent upon himself to supply his friend, Allan Breck, with cash; and, therefore, he bid the deponent tell William

1752 Stewart he must send the money, although he should  
w borrow it from twenty purses; and that he must also advance £5 to John Breck Maccoll bouman at Koalinsnacoan, if he came to demand such a sum. The prisoner desired the deponent to seek £4 more from him, being the price of two milk cows. In consequence of these messages, the deponent went to Fort-William, and asked from William Stewart the two sums mentioned. Stewart said he had not the money, and desired the deponent to proceed with his message to Glenevis, and he would see him to-morrow and give him the money. The deponent accordingly called next day in his return; but all he got was three guineas. With this he went back immediately to Aucharn, where he arrived in the evening. Mr. Stewart was not at home:—*But, in a quarter of an hour, intelligence arrived, that both Mr. Stewart and his son Allan were made prisoners.* Mrs. Stewart went immediately to the place where her husband and son were apprehended, and the deponent accompanied her. They found Mr. Stewart a prisoner. The deponent having opportunity to converse with him apart, told him he had brought three guineas. Upon this the prisoner pulled out a green purse, out of which he took two guineas and gave them to his wife, who immediately delivered them to the deponent, and the prisoner desired ‘that the five guineas should be sent to that unhappy man (meaning Allan Breck) to see if he could make his escape; and pitched upon the deponent as the person that should go with the money.’ Soon after the prisoner was carried off by a party of soldiers to Fort-William, his wife and the deponent re-

turned to Aucharn; and the soldiers, with their prisoner, stopped there by the way and drank a dram. After the deponent had supped, Mrs. Stewart told him that he must go immediately to Allan Breck with the five guineas and his clothes, who would be found at Koalishnacuan; that, if the deponent should not meet him, he might deliver the money and clothes to John Breck Maccoll, the bouman; but by no means to take the clothes to Maccoll's house, lest any body might see them. The deponent, with great reluctance, after being much entreated by Mrs. Stewart, undertook the commission; he arrived at Koalishnacuan on Sunday morning, a little after daylight, and left the clothes at the root of a fir tree at some distance from the houses. He then met John Breck Maccoll the bouman, delivered him the five guineas, and pointed out where the clothes lay. The bouman told him, that Allan Breck was at Corrynakeigh, a little above the house of Koalishnacuan: The deponent then went to sleep in the bouman's house, dined with him, and returned to Aucharn in the evening, where he found the prisoner's wife perfectly satisfied, upon being informed that the deponent had consigned the money and clothes to the care of the bouman.

John Breck Maccoll deposed, That, on the afternoon of Saturday the 16th of May, as he was in a fir bush in Koalishnacuan, he heard a whistle. Upon looking up, he saw Allan Breck at a little distance, beckoning to the deponent to come towards him. After mutual salutations, the deponent told him, he was afraid it was no good action that occasioned his being in so remote a place; and the deponent

1752 charged him with being guilty of Glenure's murder.  
Allan Breck asked the deponent what he had heard about the murder? He answered, that two poor women told that Glenure was murdered on Thursday evening in the wood of Lettermore; that two persons were seen going from the place where the murder was committed, and that Allan Breck was said to be one of them. Allan Breck answered, he had no concern in it; and, if his information was right, there was but one person about the murder; but, as he was idle in the country, he was sure he would be suspected of it. This, he said, would give him little concern if he had not been a deserter, which would bear harder upon him, in case of his being apprehended, than any thing which could be proved against him about the murder. He said, he did not doubt but the family of Ardsheil would be suspected of the murder; and it was probable the prisoner and his son Allan might be taken into custody about it; and he 'was afraid Allan Stewart, the pannel's son's tongue 'was not so good as his father's; by which words 'the deponent understood, that Allan was easier to 'be entrapped than the pannel.' Allan Breck told the deponent, he must remain in that neighbourhood till some necessities which he expected were brought to him; and that, unless some money came to him before next morning, the deponent must at all events go to Fort-William with a letter. This the deponent refused; but Allan Breck, notwithstanding, picked up a wood pigeon's quill, made a pen of it, made some ink of powder which he took out of a powder horn that was in his pocket, and wrote a letter to be delivered by the deponent to William Stewart merchant



in Maryburgh. The deponent objected, that every 1752  
body who went to Fort-William was searched. Allan  
Breck answered, it was an easy matter to hide a letter; but, if he was apprehended, it must by no means be found upon him; *he must eat it rather than it should be found.* At this time Allan Breck was dressed in a dun coloured great coat, black short coat, and blue trowsers, striped with white. Early next morning, being Sunday the 17th, the deponent met Alexander Stewart, the preceding witness, who inquired for Allan. Being worn out with fatigue, and two nights want of sleep, he went to rest in the deponent's house, and gave him five guineas, and Allan Breck's own clothes, to be delivered to Allan. At night, after the deponent had gone to bed, he heard somebody rapping at the window. He got up, went out of the house in his shirt, and saw Allan Breck at a little distance, who inquired if any message had come for him. The deponent answered, that his uncle's son had come with five guineas and some clothes to him. The deponent expressed his fears that Allan Breck would starve among the heath; and regretted that he was unable to help him. Allan said, he had no occasion for victuals, but wanted a drink very much. Upon this the deponent went back to his house and fetched a dish of whey, and the five guineas, and delivered them to him, and also gave him his clothes. He told Allan, that the prisoner and his son were apprehended on account of Glenure's murder; Allan answered, 'that was no more than he expected; but it would not signify much, as there could be no proof against them; but expressed some apprehension lest Allan Stewart, son to

1752 ' the prisoner, might be betrayed by his own tongue.'\*

Next morning the deponent found Allan Breck's borrowed clothes, and the dish which held the whey, lying together at the place where they had parted the night before; and since that time he had not seen him. Deposed, That, about two years ago, a conversation passed between the deponent and the prisoner about Glenure's being to take the management of the estate of Ardsheil from him, which would disable him from being of any service to Ardsheil's children; and the prisoner then said, '*he would be willing to spend a shot upon Glenure, though he went upon his knees to his window to fire it.*'

Hugh Maclean, barber in Maryburgh, deposed, That he was sent for to the prison by Mr. Stewart to shave him. He asked what news? The deponent answered, he heard that the prisoner was to be carried to Edinburgh on the Monday following. The prisoner replied, that was a matter which gave him no concern; he '*wished it had happened sooner; and was afraid of nothing, but that his servants might take money, and turn against him; and desired the deponent, as from him, to tell his servants to say nothing but truth, to keep their minds to themselves, and he would take care of them.*' He gave the deponent a shilling. The deponent delivered the message to the prisoner's servants, and also told his son of the message he carried from his father to the servants, and the son gave him half-a-crown.

\* The witness, and another of the prisoner's servants, as well as their master, and his son Allan, were committed close prisoners in separate apartments at Fort-William.

Hugh Stewart in Edinburgh, a witness cited for 1752  
the prisoner, deposed, That Allan Breck was in use  
frequently to pass between France and Scotland; that  
he lodged, when at Edinburgh, in the deponent's  
house; and that he used only to go abroad under cloud  
of night, being afraid to be seen, as he was a deserter.

Catherine Macinnes deposed, That, on the even-  
ing of Glenure's murder, she saw Allan Breck in the  
moor of Ballachelish. He asked what was the occa-  
sion of the stir in the town? She answered, Glenure  
was murdered. He inquired who committed the  
murder? and she said she did not know. He then  
requested the deponent 'to tell Donald Stewart in  
' Ballachelish to go to the pannel and desire him to send  
' the said Allan money; and that she delivered this mes-  
' sage to Donald Stewart that same night.' She told  
the said Donald Stewart where she had seen Allan  
Breck.

John Stewart younger of Ballachelish, deposed,  
That, on the day after Glenure's murder, the de-  
ponent was in the prisoner's house, who told him of  
his having got a message from Allan Breck that  
morning, by Donald Stewart, to send him money,  
which the prisoner said he was resolved to do.

Several witnesses deposed to their having seen Al-  
lan Breck dressed occasionally in a black short coat  
and white buttons; and John Cameron of Strone,  
and Ewan Cameron his servant, deposed, That  
they heard one Serjeant More threaten to shoot Glen-  
ure, on account of his hard usage of the tenants of  
Ardshiel.

1752

*Verdict of the Jury.*

They found ‘*unanimously*, the pannel, James Stewart, guilty, art and part, of the murder of Colin Campbell of Glenure.’

*Sentence of the Court.*

They adjudged the prisoner to be taken, on Wednesday the 8th of November, to the south side of the ferry of Ballachelish, to be hanged on a gibbet till he be dead, his body to be hung in chains, and his personal estate to be forfeited.

The Duke of Argyle, Lord Justice General, then addressed the prisoner in a speech of considerable length; a speech upon which I decline to preoccupy the reader’s remarks by any of my observations. The Duke began by telling the prisoner that he had a ‘most impartial trial,’ and that he had been prosecuted ‘with all the moderation consistent with the ‘crime’ of which he stood accused. His Grace then speaking of the murder of Glenure, whose oppressions appear to have so deeply affected the family of Ardshiel, and their dependants, told the prisoner, ‘it may be said of you, that you first eat his bread, and then shed his blood.’

After descanting upon the different rebellions raised by the partisans of the house of Stewart, and particularly that of 1745, the Duke proceeded: ‘If you had been successful in that rebellion, you had been now triumphant with your confederates, trampling upon the laws of your country, the liberties of your fellow subjects, and on the Protestant

‘ religion: you might have been giving the law where 1752  
‘ you have now received the judgement of it; and ~~~~~  
‘ we, who are this day your judges, might have been  
‘ tried before one of your mock courts of judicature,  
‘ *and then you might have been satiated with the blood*  
‘ *of any name or clan to which you had an aversion.*’

‘ Though you don’t now stand accused as a rebel,  
‘ nor am I permitted to call you a traitor, because  
‘ his Majesty’s undeserved mercy to you did several  
‘ years ago restore you to the state of an innocent  
‘ man; yet I may say, with great force of truth, that  
‘ this murder has been visibly the effect and conse-  
‘ quence of the late rebellion.’

The prisoner then addressed the Court in these words: ‘ My Lords, I tamely submit to my hard sen-  
‘ tence. I forgive the jury, and the witnesses, who  
‘ have sworn several things falsely against me: and  
‘ I declare before the great God, and this auditory,  
‘ that I had no previous knowledge of the murder of  
‘ Colin Campbell of Glenure, and am as innocent of  
‘ it as a child unborn. I am not afraid to die; but  
‘ what grieves me, is my character, that after ages  
‘ should think me capable of such a horrid and bar-  
‘ barous murder.’

On the fatal day, the prisoner was escorted by a strong military guard to the place of execution. He produced three copies of a paper containing his dying speech; one of these he delivered to the civil magistrate, another to the commander of the troops which guarded him, and the third he read with a distinct voice to a great multitude of spectators which had come to witness his execution. And in his

1752 speech,\* which was very minute, he denied all accession to, or previous knowledge of, Glenure's murder. The minds of the spectators, already engaged with the circumstances of this extraordinary trial, and the awful scene which was before them, were struck with superstitious terror at the tempest which raged during the time of the execution. And the prisoner went through the last act of this tragedy with composure unalloyed with meanness, and fortitude not tinged with arrogance.

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A criticism upon the nature and amount of the minute detail of circumstantial evidence led in this prosecution would fatigue the reader, and swell this trial to a size unsuitable to this work. I shall therefore briefly call the reader's attention to the leading circumstances tending to the conviction or acquittal of the prisoner.

The guilt charged against him is, that he was accessory to, and *art and part* in conspiring the murder of Glenure, which was perpetrated by Allan Breck Stewart. Therefore, if there be not legal evidence that Allan Breck was the murderer, the charge of guilt vanishes, and it becomes perfectly unnecessary to consider the second proposition, viz. the pri-

\* Scots Magazine, vol. XIV. p. 509, 525, 555. The speech is printed in this Magazine. Mr. Stewart complains in it of the harsh and unfair treatment he suffered from the prosecutors, from the 16th of May, that he was apprehended without *any written warrant*, and carried prisoner, under cloud of night, to Fort-William, till the end of his trial.

soner's accession to the murder alledged to have been committed by Allan Breck. 1752

The only positive evidence relative to the perpetrator of this murder, is, that it was committed by 'a man with a short dark coloured coat,' and this is, in some respect, applicable to Allan Breck, as he was seen on the day of the murder, not far from the place where it was committed, dressed in a dun coloured great coat, and dark short coat. Allan Breck did frequently use threatening expressions against the deceased, and he did display the most indubitable signs of fear and guilt. But it is certain that his guilt, as a deserter, was heightened by his having been in the rebellion, and that his life was thus forfeited to his country; and the reader must determine with himself whether Allan Breck's fear of being apprehended proceeded from the desertion, of which he was notoriously guilty; or from this recent murder, of which, even independent of guilt, he had reason to conclude he would be suspected, on account of his connection with the family of Ardsziel, and of his fugitive and wandering life.

The circumstances from which the prosecutors inferred the prisoner's accession to this murder, may perhaps be fit enough to excite a suspicion of guilt in the speculations of the closet, but I apprehend them to be in the highest degree improper and dangerous, to be produced as evidence to affect the life or fortune of a prisoner in the tribunal of justice.

The circumstances were shortly these: that Allan Breck, a kinsman of the prisoners, paid him a visit three days preceding the murder, sat with him and other company at supper, and slept in a barn: that

1752 Allan Breck put off his French clothes, dressed himself in a short coat belonging to the prisoner, or his son, ere he went to work in a field of potatoes; and next morning, when he left the house, went off dressed in the short clothes, and left his own; which, by the bye, he had done upon former occasions: that the prisoner, upon the search that was to be made for the murderer of Glenure, supplied with money, for the purpose of making an escape, his kinsman, Allan Breck, a fugitive, and a deserter: that the guns about the prisoner's house were hid, in a country where it was a crime to be possessed of arms: that the prisoner had used repeated expressions of resentment and of vengeance against Glenure; and that, after the murder, Allan Breck expressed his apprehension lest the prisoner or his son should be betrayed by their own tongue.

These are the amount of the evidence against the prisoner, which resulted from a scrutiny, by no means warrantable, into his life and conduct. The rigorous durance in which he himself was confined, and his son and servants being kept close prisoners in separate apartments, have been already mentioned. His repositories were thrice searched by the prosecutor's relations \* without legal warrant, and attended by a military force: and every circumstance of his life and conversation, for a period of two years, was raked into with the most invidious industry.

\* The trial of James Stewart, p. 34. Edinburgh, printed for Hamilton and Balfour, 1753. This publication, which contains the speeches of the Lord Justice General, and of the counsel, as well as the whole of the recorded trial, swells to the enormous bulk of 437 pages 8vo.



But this last mode of extracting evidence, and the result which flowed from it, require to be particularly considered. 1752

Where there is no positive evidence demonstrating the author of a mischief which an individual has sustained, menacing expressions may be justly admitted, along with other circumstances, as a link of the chain of circumstantial evidence against a prisoner. But, to lay much stress upon general expressions of resentment, and even of vengeance, such as, 'I wish he were hanged;' 'he is unworthy to live;' 'I will cause him to repent it,' or the like, would lead to a conclusion equally false and fatal. In social intercourse, the energy of our expressions of applause or of censure, of gratitude or of resentment, is often proportioned to the strength rather of our language than of our feelings. But, if a deep and mortal blow be meditated, I apprehend the deviser, instead of suiting his expressions to his purpose, would endeavour, by the smiles of his countenance, and the smoothness of his language, to conceal the rancour of his heart.

Let any person who has laboured under embarrassed circumstances, who has felt for the distress, for the impending ruin of his family; who has been chastised by the rod of power, reflect upon the expressions of resentment and of anguish which may have escaped him when his heart was open to a friend, when his passions were inflamed by liquor; and then let him condemn (if he can) the prisoner as a murderer, on account of the expressions of vengeance which are proved against him in the course of this trial.

1752 The only part of the evidence affecting the prisoner which makes a serious impression upon me, is what fell from Allan Breck in the wood of Koalisnacoon, that he was afraid lest the prisoner's son 'might be betrayed by his own tongue\*.' The following reasons, however, lead me to doubt the safety and propriety of making such an expression as this the foundation of taking away the life and fame of a prisoner: 1mo, The witness who deposed to it trembled under the rod of power; he had been confined to close custody in Fort William, and perhaps dreaded that he himself might be brought to trial for this murder. 2do, The smallest variation from Allan Breck's expression, proceeding from misconception, or want of memory in the witness, or from the mistake of the interpreter who translated the evidence, might make an important difference in the conclusion to be drawn from Allan Breck's words. For instance, if Allan Breck, instead of saying he was afraid the prisoner's son 'might be betrayed by his own tongue,' did say, he was afraid the prison-

\* Unless that rule in the scriptures, of visiting the sins of the father upon the children is to be *inverted* by our law, and the sins of the children are to be visited upon the father, I entertain a faint suspicion that a mistake has been committed in the course of this trial, and that (if any of the family was guilty) the prisoner has been hanged instead of his son Allan. The circumstances of the little gun in the depositions of Dugald and John Beg Maccoll, and Allan Breck's fear lest the prisoner's son's tongue should betray him, afford a more pointed evidence against the son than any which is adduced against the father. Besides, it is worthy of remark, that the prisoner's son had a coat precisely of the same make and colour with that which Allan Breck wore on the day Glenure was murdered.

er's son ' might *fall a victim to his own tongue;*' in 1752 this case, Allan Breck would have said no more than what was notoriously just and true, viz. that the resentful expressions used by the prisoner and his son against Glenure would bear hard upon them.

This trial, upon the whole, points out the propriety of two alterations being adopted in the criminal-law, of Scotland: *1mo*, That the prisoner should here, as in England, have a power of challenging a certain number of the jurors, without cause assigned. *2do*, That, in the Highlands of Scotland, where the districts are peopled by tribes or clans, between many of which inveterate feuds did subsist, a prisoner should have it in his power to say, ' I who am a Stewart will ' not be tried by a jury of Campbells, for the murder ' of a Campbell;' or, ' I who am an officer of excise, ' will not be tried for the murder of a smuggler, in ' a country where all merchants, farmers, &c. are ' smugglers.' And, as the lawyers for the crown have it in their power to bring a prisoner from the district where he lives, or where a crime has been committed, to stand trial before the High Court of Justiciary at Edinburgh, so a prisoner likewise should have it in his power to avoid the prejudices which may be entertained of him in a particular district, and to claim being tried at Edinburgh.

*Malcolm M'Gregor, alias John Grant, for the Murder of John Stewart, both of the Parish of Glegairn, in Aberdeenshire.—Doctrine of Prescription of Crimes Established.*

1773 THE prisoner was brought to trial before the Circuit Court of Justiciary, at Aberdeen, in Spring, 1773; but as he pleaded in bar of the action, a general point of law of great importance, his Majesty's Advocate depute *deserted the diet*,\* recommitted the prisoner upon a new warrant, and served him with a new indictment; upon which he was tried before the High Court of Justiciary, at Edinburgh, on the 26th July, 1773. He was charged with enticing John Stewart tenant in Abergairn, on the evening of Christmas day, 1747, to a remote place, and there, from premeditated malice, striking him from behind with a stick, and then stabbing him in the left side with a durk, so that he died that same night;† and that, before his death, he declared it was the prisoner who had thus assaulted and wounded him: that the prisoner immediately fled, changed his name from Malcom M'Gregor to John Grant, and had not since been seen in that part of the country, except to a few persons privately, and under cloud of night.—And that a warrant for apprehending him was issued by the late Lord Minto, on the 21st of January, 1748; but, by reason of the prisoner's changing his name

\* i. e. dropped the prosecution.

† Records of Justiciary, 26th July, 9th August, 1773.

and place of abode, he never could be found till late- 1773  
ly, that he was discovered and apprehended by the ~  
sheriff of Edinburgh.

The celebrated Alexander Lockhart, counsel for the prisoner, represented to the Court, that no action could lie upon this indictment; because the crime charged in it was said to have been committed in the year 1747, and consequently *was prescribed by the lapse of more than twenty years*. Counsel were heard at great length. The Court then ordered both parties to lodge *informations*†, in order to their being recorded in the books of adjournal.

In the information upon the part of the Lord Advocate, it was argued, *1mo*, That the vicennial prescription of crimes in the Roman law, which the prisoner made the foundation of his plea, did not extend to every species of crime; but that, in those of a deeper die, such as parricide, and some others *inter graviora delicta*, no prescription took place. *2do*, That the civil law was no part of the common law of Scotland, although its rules were often adopted, and its principles much respected, in such cases as did not fall within the enactment of our statutes, the decisions of our Courts, or the opinions delivered in approved systems of our law. His Lordship next maintained, that, in the common law of Scotland, there was no vestige of a prescription in crimes; for the punishment of murder was a part of the most ancient common law of Scotland; but our old trea-

† A law case in Scotland, which contains both the fact and argument, is sometimes entitled an *information*, and sometimes a *memorial*.

1773 tises made no mention of the doctrine of prescription; nay, the word prescription was not to be found till the year 1469, when it was introduced in a statute, and, even then, it related to civil obligations, and not to crimes.—His Lordship maintained, that the opinions of our commentators upon this head, which were urged in behalf of the prisoner, viz. those of Sir George M'Kenzie, Mr. Forbess, and Mr. Erskine, were neither sufficiently explicit, nor of sufficient authority, to make the prescription of crimes be deemed a part of our law; and, on the other hand, Lord Fountainhall laid down this doctrine, that the vicennial prescription of crimes had no place with us. And that, in the whole of our records, no judgement could be found sustaining this plea in bar of action, while there were many instances of persons being tried for crimes more than twenty years after their commission. Farther, it was contended, that by *the law of God, which is a part of our law*, there is no prescription of murder. And, *lastly*, That it would be highly inexpedient to establish a defence in bar of prosecution against a murderer; because nothing contributes more to check murder, and other atrocious crimes, than an impression upon the minds of the people, that, when once committed, no lapse of time will expiate the offence in this world, or prevent the punishment. There was also subjoined to the information for the prosecutor, a list of cases from the books of adjournal, where prisoners were tried at the distance of more than twenty years from the commission of the crime. They were mostly in trials for witchcraft, and one of them for incest committed thirty-five years before.

It was stated in the information for the prisoner, 1773 that, although conscious of innocence, and certain that he could not be convicted by a fair proof of the crimes laid to his charge, his counsel had thought it their duty to plead the obvious defence of prescription, in bar of this prosecution:—That, in a period of twenty-five years, which had elapsed between the death of John Stewart, whom the prisoner was accused of having murdered, and his commitment, in order to stand trial, he had resided constantly in Scotland, and chiefly in Aberdeenshire, the theatre of the alledged crime; that he had publicly carried on business, in an honest and industrious manner, and with an unexceptionable character; and that the change of his name, and place of abode, was owing to the attempts of a recruiting serjeant to trepan him as a soldier, which induced him to lay aside the name of Macgregor, which was proscribed by law, and to assume that of Grant.

Upon the point of law, it was argued, that a vicennial prescription of crimes was an established doctrine of the Roman law; and, in support of it, several texts from the *Corpus Juris Civilis*, and other authorities, were quoted; particularly, *Cod. lib. 9. tit. 22. l. 12.*; *lib. 1. tit. 7. l. 4. digest.*; *lib. 44. tit. 3. l. 13.*; *lib. 49. tit. 14. l. 1. § 4.*; *lib. 48. tit. 17. l. 3.*; *lib. 48. tit. 16. l. 11.*; and *Mattheus, Tit. de Praescriptione Temporis*; *Voet. Tit. de Diversis et Temporalibus Praescriptionibus, § 6.*; *Cujacius, vol. 4. col. 1338.*; *Heineccius ad Pandectas, lib. 44. tit. 8. § 370. &c. &c.* It was maintained, that the civil law was one of the fountains of our jurisprudence, and, in reality, a part of it, where our own statutes,

1773 customs, and the decision of our judges, are silent.\*  
 ~~~~~ And the authority of our commentators on the Scots law, particularly of Sir George Mackenzie, and of Mr. Erskine, was quoted in support of the prescription of crimes. The opinion of Fountainhall was said to refer to a case of murder which had happened only eighteen years before, where, consequently, the vicennial prescription could not take place; and that even Fountainhall admitted, that lapse of years might in some measure expiate a crime.

As to the list of cases given in by the Lord Advocate, where prisoners were prosecuted at the distance of more than twenty years from their offence, it was observed, that most of these were for witchcraft, which, like apostacy, is a *crimen continuum*; for it was held,—*once a witch, always a witch*. Besides, that, in the prescription of crimes, the same rule must take place as in the prescription of accompts, viz. that it runs not from the first, but from the last article. As to the case of incest quoted for the prosecutor, where a man was hanged, at the distance of thirty-five years, for lying with his wife's

* To see this publicly contradicted must excite a smile in a person who has undergone a professional education for the Scottish bar, or who is in the least acquainted with the proceedings of our courts of justice. Before a young gentleman is admitted to the bar, he undergoes a strict examination upon the civil law: and it is only within these forty years, or thereabout, that it was thought necessary to ordain a candidate for the profession of a lawyer to undergo an examination upon the Scots law, properly so called.—The information for his Majesty's Advocate against the Glasgow rioters, A. D. 1725, has these words: 'By the Roman law, which is the common law of this kingdom;' Records of Justiciary, 25th September, 1725.

daughter,* it was answered, that no counsel appeared for the prisoner; that no defence was offered for him; and that it happened in times worthy of such a sentence, viz. those of fanaticism and usurpation. The counsel for the prisoner also referred to the case of Macleod of Assint† as a precedent in support of the prescription of crimes. The case was this; Macleod was tried on the 2d of February, 1674, upon an indictment charging him with several treasonable crimes; viz. 1st, With betraying, under trust, the late Marquis of Montrose, his Majesty's Commissioner, and Lieutenant-General, and delivering him a prisoner to the rebels in A. D. 1649, who murdered him; for which the said Macleod of Assint received a reward of 400 bolls of meal. 2d, With having, in A. D. 1654, assisted the English rebels commanded by General Morgan in burning and plundering the north. 3d, With having, in A. D. 1669, exacted arbitrary taxations upon all shipping that came to anchor in any of the creeks belonging to the prisoner. And, 4to, With having, in A. D. 1670, fortified and garrisoned his house of Ardbreck, and defended the same against the sheriff of Sutherland, who had his Majesty's warrant to eject him. Now, although the two first articles in the indictment are by much the deepest of the crimes with which Macleod of Assint was charged, his Majesty's Advocate declared, 'he did not insist upon the two first crimes 'libelled but only as aggravations.' Which the prisoner's counsel alledged could proceed alone from the crimes being prescribed.

* See Index, article *Incest*.

† Records of Justiciary, February 2, 1674.

1773 The counsel for the prisoner likewise argued, that the admittance of a perpetual right of actions for crimes was inexpedient in every country; and, considering the nature of our criminal law, was peculiarly so in Scotland. It was alledged, that the design of punishments respected either the criminal or the public. With respect to the criminal, the purpose is to produce an amendment in his life and manners, or to cut him off from society, if the enormity of his crime indicates such depravity that he may be looked on as incorrigible. But this cannot be answered by prosecuting a criminal after the years of prescription; for, if the seeds of guilt had not been eradicated from the mind, the various agitations to which a man is exposed from the occurrences of twenty years, must have made them sprout forth into fresh outrages against society. And, if the revenge of a private prosecutor demanded an expiation of guilt, what more terrible punishment, than that a criminal should live under the continual apprehensions of an ignominious death for a period of twenty years? To drag a man thus situated to the scaffold, after a regular, industrious, and exemplary life, would as little suit the end of punishment which respected the public, as that which respected the criminal: for, with regard to the public, the end of punishment is to deter others from committing the like offence; but no good impression can be stamped upon the public, when their compassion for the criminal exceeds their horror at his crime, which must be the case when the memory of an offence is obliterated, while, at the same time, the inoffensive, perhaps exemplary, conduct of the sufferer, is con-

1773

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sistent with the knowledge of those who behold his sufferings.\* The laws which relate to property, wisely regarding the security of our fortune against obsolete and endless claims, have established a prescription of every species of *civil action*; much more ought the laws to secure the peace of mankind, by limiting the right of *criminal action*, which at one blow may complete the threefold ruin of fortune, of life, and of fame. Besides, a person suspected of an offence may lie under great disadvantage by the prosecutor's having an unlimited power of choosing his time of action. He may bring it at a period when there is such a spirit of violence in a country against a man, a party, or a crime, that, in the ferment of people's minds, accusation may be equal to conviction: and, besides, in a long lapse of time, the death or absence of witnesses may deprive a prisoner of his plea of *alibi*,

\* Within these four or five years, a person returned to this country with an affluent fortune and respectable character, who, in an early period of life, absconded on account of his being concerned in the mob which hanged Porteous, A. D. 1736. What good purpose could it serve to indict this man capitally upon his return? (For an account of the Porteous mob, see Arnot's History of Edinburgh, p. 206.) Or what good purpose could it now serve to bring a prosecution against the rioters who, in A. D. 1779, burned the Popish chapel, committed housebreaking and robbery upon the priest, and assaulted the houses of many respectable citizens whom they supposed to befriend the Popish bill? Yet, had not the public prosecutor, from whatever motives of lenity or timidity, omitted to raise a prosecution for hanging the ring-leaders in this scene of tumult and devastation, *I firmly believe that the burning of London, A. D. 1780, would not have happened.* At least it is certain, that a popular orator, in haranguing his friends previous to this dreadful event, would not have had such cause to boast of the gallant example of the Scots.

1773 provocation, self-defence, that the deceased died a natural death, &c.

If prescription of crimes be expedient in general, it is so in a special manner in Scotland, whether we regard the powers of the prosecutors, or the nature of our laws. As to the former, the Lord Advocate may prosecute any person for any crime he chooses: his Lordship is not restrained by the necessity of a grand jury's finding a bill; nor is a coroner's inquest called upon the body of a person deceased to ascertain the cause of a sudden and suspicious death. It is wretched argument indeed, to alledge that this power is not dangerous, if restrained by no limits of prescription, because of the benignity of the Prince, or the personal character of the gentlemen who are appointed to the important office of Lord Advocate. Salutary laws are not made in tyrannical times, but in a mild and equitable reign. Thus the opportunity of guarding against oppression, in general, occurs, when there is the least prospect of oppression being at hand. But, however safe we may be from oppressive prosecutions at the instance of his Majesty's Advocate, what security have we but the lapse of time, against the invidious actions of private prosecutors, who, instigated by malice, or with a view to extortion, might call upon a man to answer for the *sins of his youth*, after he had become a grave and respectable citizen, and the father of a numerous family? For prosecution is granted, in its utmost latitude, either to the party injured, or to his nearest heirs; nor can the Lord Advocate withhold his *concurrence*\*. Should connubial love be turned into

\* Consent to the prosecution.

deadly rancour, either the husband or the wife may prosecute the other for adultery *to the effect of a capital punishment*.\* 1773

The healing hand of prescription is no less expedient in relation to the nature of our laws. To say what is a capital crime by the law of Scotland, and what not; or, at least, what has been, or has not been so, within these hundred years, is no easy matter.† Our indictments are laid sometimes on the statute, sometimes on the common, and sometimes on the Mosaic law alone. Many of our penal statutes are wild, tyrannical, and incorrect; and in few of them anterior to the present century, is there a limitation of the time of raising prosecutions upon them. Happily the Scottish treason laws are now abolished, and those of England substituted in their room. Prosecutions for witchcraft too are driven to the realms of night. But still the laws against Popery, blasphemy, duelling, adultery, and suicide,‡ may be used as ample engines of oppression. Besides, there truly is no reason why either the public or private prosecutor should be indulged with an unlimited time of bringing his action. If the accused absconds, his flight will not cut off the right of prose-

\* See a remarkable trial of this sort *infra*. Index, Adultery, Huttly against Fraser.

† If the reader is already satisfied of this from some of the trials for treason and murder presented above, he will not see occasion to alter his opinion, from a perusal of the subsequent part of this work.

‡ As the penal consequences of this crime can only take place after death, if the right of prosecuting for the personal estate of the deceased be not limited by prescription, it must *continue for ever*.

1773 cution; for, if he does not appear in Court to answer  
 to the indictment which may be brought against  
 him, the sentence of outlawry, which passes of  
 course, will preserve to the prosecutor a perpetual  
 right of action; therefore, the prosecutor may blame  
 his own negligence, if he has lost his right of prose-  
 cution, by omitting to obtain a sentence of outlawry  
 against the accused. And, if no symptoms, no sus-  
 picion of guilt, have been discovered in a period of  
*twenty years*, or, what is the same, none that can  
 justify the raising a prosecution, it is better that the  
 prosecutor should then be deprived of his right of  
 action, than that a person should be called upon to  
 defend himself against a capital indictment, at any  
 distance of time, however so remote.

The Lords having considered the informations for  
 his Majesty's Advocate, and for the prisoner, pro-  
 nounced this interlocutor: ' In respect it does not  
 ' appear that any sentence of fugitation passed a-  
 ' gainst the pannel, they therefore sustain the de-  
 ' fence, and dismiss the indictment and the pannel  
 ' from the bar.'

I remember to have listened with attention to the  
 pleadings in this cause, and to have looked with an-  
 xiety for their Lordships' judgement. The satisfac-  
 tion I felt when it was pronounced, is not abated up-  
 on reflection. This judgement, indeed, is of a very  
 different cast from the general stile of the decisions  
 of this Court in the last century. It is a just, but  
 trite remark, that a wise system of laws tends to  
 humanize manners; but it is no less true, that liber-  
 ality of sentiment, and gentleness of manners, hu-  
 manize the rigorous doctrines and discipline of the  
 law.

## OF TUMULT WITHIN BURGH.

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*David Mowbray, Shoemaker, for exciting a Tumult in the City of Edinburgh, and rescuing a Baker whom the Hangman was whipping through the Canongate, by order of the Magistrates.*

THE preamble to one of our old statutes emphatically describes the disorders which prevailed in this country from one of the worst of political evils, *the relaxed arm of the civil magistrate.* <sup>1686</sup> ‘Forasmeikle (says the statute) as the oversight and negligence of the civil magistrates, and judges ordinar within this realm, in putting of decreets to execution, punishing of malefactours and rebels, utherwise using of their offices, as becummis, partelie for regard, and feare of strang pairties, and hazard of their own lives; and pairtly throw want of sufficient preparation for that effect, is the original and principale cause quhair fra\* the great confusion and disordour of this lande in all estaites proceedist.†’ Therefore by this, and other acts of parliament, it is statuted, that the raising or assembling within borough, conventions of the people, without special licence of the

\* From which.

† Mary, Parl. 9. c. 88.; James VI. Parl. 13. c. 184. Parl. 18. c. 17.

1686 Sovereign, or authority from the magistrates of the borough; especially, if such people should presume to arm themselves, to display banners, *to beat the drum*, or sound the trumpet, or to make use of other warlike instruments whatever, it is statuted, that persons thus offending shall suffer the pain of death. It is further enacted, that, whoever shall disobey and resist the authority of the *Magistrates of Edinburgh*, or their officers, in the execution of their duty, shall suffer the like penalty.

The prisoner was tried on these statutes.—On Sunday the 31st of January, 1686, a rabble of journeymen and apprentices in Edinburgh, leagued with some students at the University, among whom fanatical principles had of late made an alarming progress,† assembled for the purpose of insulting and interrupting those of the Popish persuasion in the exercise of their religion. Their indignities were directed at the Chancellor's Lady, and other persons of that faith, when dismissing from their place of worship. The mob, many of which were armed, pelted the members of that congregation with stones and dirt, rifled some of them of their clothes, and mal-

† Upon Christmas-day, A. D, 1680, the Magistrates of Edinburgh, from that decent respect which was due to the Duke of York, who was then in the city, interrupted the students in their solemn procession of a Pope-burning; so that they were fain to burn him post haste in an obscure part of the town. On the 11th of the ensuing month of January, the house of Priestfield, the seat of Sir James Dick, Lord Provost of Edinburgh, was willfully set on fire, and with all the furniture, burnt to the ground, not without the most pregnant suspicion that it was set on fire by the students at the University. Arnot's Hist. of Edinburgh, p. 362.



treated them in their persons; and then proceeded 1686  
to the High Street of Edinburgh, where, with iron-  
bars, and other instruments, they attempted to break  
open the houses of several of the inhabitants, and  
did resist the magistrates of Edinburgh, and the  
Commander in Chief of his Majesty's forces, and  
the troops under their command, and wounded sev-  
eral of the soldiers who were assembled in order to  
disperse the mob.

The military having dispersed the mob, and sev-  
eral of the rioters being apprehended, the magi-  
strates, next forenoon, ordained one Grieve, a bak-  
er, an active person in the tumult, to be instantly  
whipped through the city by the common execution-  
er. To save the delinquent from undergoing the  
punishment awarded by the magistrates, the prison-  
er Mowbray, and his associates, collected a mob a-  
fresh, rescued the baker, from the town officers and  
the executioner, and carried him off in triumph.

The prisoner was served with an indictment,  
charging him with having transgressed the statutes  
already specified, by being engaged in this tumult;  
and his Majesty's Advocate declared, that he restric-  
ted the libel against the prisoner to his 'accession to  
'the tumult on Monday in the forenoon, in rescu-  
'ing the baker from the execution of justice.' The  
Lords found the libel, as restricted, relevant to infer  
the pain of death.

### THE PROOF.

The prisoner judicially declared, that he was present  
at the tumult libelled, and assisted in rescuing the

1686 baker from the town-officers. He craved God and the king's pardon for his offence, declared that he was heartily sorry for it, and came in the King's will.

George Macfarlane, one of the town officers of Edinburgh, deposed, That on Monday last, as he was employed by the magistrates to execute the sentence against Grieve, the prisoner was one of the mob which rescued him. The deponent called out to the prisoner to be gone; but this he refused, saying, 'he would take part with the *trades*;' and, upon Grieve's being rescued from the town officers, the deponent saw the prisoner take Grieve by the hand, and march off with him amidst the mob.

John Thomson, town officer, deposed, That, on Monday last, he saw the prisoner amidst the mob which threw down the town officers, and rescued the baker, and heard him declare he would stand by the *trades*.—Two more witnesses swore to the same purpose.

The jury unanimously found the prisoner's accession to the tumult, in rescuing the baker from the execution of justice, proved by his judicial confession.—The Court adjudged the prisoner\* to be taken to the Cross of Edinburgh on Wednesday next, the 10th of February, and to be hanged on a gibbet till

\* Fountainhall says two persons were tried this day for being concerned in this tumult; but he does not mention their names. The records of justiciary testify, that no person was tried or outlawed on account of this tumult, at this time, except Mowbray, nor at any other time that I know of, except on the 26th of that same month, when Keith, whose trial is also mentioned by Fountainhall, was tried and convicted. See Fountainhall's Decisions, vol. 1. p. 401. 407.

he be dead. It appears that the Privy Council granted the prisoner a reprieve till a short day. Whether he got any farther respite, or was then hanged, is uncertain, as the records of Privy Council for A. D. 1686 are missing. One Keith, a fencing-master, was tried on the 26th of that month for accession to the same tumult; was convicted, and was hanged at the Cross of Edinburgh on the 5th of March.

The discipline manifested in this trial, conviction, and execution, when compared with a recent occurrence, impresses us with no very favourable idea of the present times.

The tumultuous disposition of the rabble\*, impatient at the price of grain after a succession of bad crops, had broke forth in a variety of outrage that required an exemplary and decisive check. William Spence, a matross in the second battallion of artillery, was prosecuted by his Majesty's Advocate before the High Court of Justiciary at Edinburgh, on the 13th of December, 1784. He was charged in the indictment with being an active person in assembling a mob, on the 7th of June preceding, at the village of Ford, about ten miles from Edinburgh, for the

\* In the prospectus of this work which I published, I proposed to lay before the public the trial of the malt-tax rioters for pillaging and demolishing the house of Mr. Campbell of Shawfield, A. D. 1725; but, upon fully examining and considering the charge against the prisoners, the informations for his Majesty's Advocate, and them, the interlocutors of the Court of Justiciary upon the defences stated for the prisoners, the proof led in the cause, the verdict of the jury, and the judgement of the Court; I say, upon a consideration of the whole circumstances, this trial, according to my ideas, is in many respects improper for publication.

1686 declared purpose of demolishing a distillery;\*—with exciting a number of colliers to join the mob;—with breaking into the distillery, and actually setting fire to one or more of the buildings with his own hands.† —As the evidence in this trial is not recorded, I have it not in my power to speak from my own knowledge as to the evidence of Spence's guilt: but, notwithstanding that the crime was *wilful fire-raising*; notwithstanding I have been informed by every person I have conversed with who was present at the trial, that the evidence of his guilt was complete, 'the jury, by a great plurality of voices, found the pannel *Not Guilty*.'

The consequences to a country, if juries will be so preposterous as to acquit a prisoner contrary to evidence, for a crime so dangerous to society, are too obvious to require to be enlarged upon. I must, however, take the liberty to observe, that it appears requisite that the mode of summoning juries in this city should undergo some alterations. The number of trials by jury in Edinburgh, before the Courts of Justiciary, Exchequer, &c. is considerable, and the jurymen are generally chosen from among the merchants, shopkeepers, and tradesmen. Those who follow the profession of the law‡ are never called. The landed gentlemen, or freeholders, of the three Lothians, are seldom or never summoned, except

\* This distillery was burnt to the ground. The damage was estimated at £7000.

† Records of Justiciary, December 13, 1784.

‡ The Faculty of Advocates claim an exemption; and those who practise at the bar are undoubtedly entitled to it.

in the trial of a *landed* man. The inhabitants of the town of Leith, although men of consequence in the mercantile line, are seldom called but in trials which have some relation to maritime affairs. A practice has also crept in of not summoning upon a jury, gentlemen who have preferred a residence in Edinburgh to living at their estates in the country, and who, consequently, cannot be called to attend the circuits in their respective districts. By these means, the rotation of duty of sitting upon jury comes very frequent upon that class of people which are in use to be called, and the duty imposed upon them is therefore *heavy and unequal*. By these means, also, *improper persons* are sometimes summoned to sit in jury upon a prisoner: for this important article in the administration of justice is generally left to inferior clerks.—It is perfectly well known that there is a description of men in this city, of whom it could not be expected that any power of testimony would lead them to convict a prisoner of certain crimes,\* yet who (it is believed) would listen with gloomy joy to criminal accusations of a nature that no Lord Advocate would now dream of raising. By extending, therefore, the classes of people from which our jurymen are to be chosen, the burthen will become the easier upon those who discharge this important trust, and the danger will be avoided of having

\* I humbly think, that, in trials of difficulty and importance, the proper officer should have it in his power to send up to the Court a list of forty-five men whom he thinks intelligent and independent; and that, when the judges name the fifteen who are to sit upon the jury, the prisoner should have it in his power to challenge a third of them without any cause assigned.

1686 crimes of the most pernicious tendency tried by a jury of men illiberal in their sentiments, and violent in their prejudices, who, in the trial of a prisoner, consider more *the nature of the crime, than the strength of the evidence.*

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I have heard it urged as an apology for the jury who sat upon Spence, in having given such a verdict, that they would have pronounced a different one, had it not been, *that, of late, too little respect has been paid to the opinions of jurymen when recommending a convict to mercy.* This, I know, alludes to the case of James Andrew, who was convicted of robbery, and condemned; and who, notwithstanding that the jury unanimously recommended him to mercy, was executed in terms of the sentence, upon the 4th of February, 1784. As this has been a topic of conversation, and with some, of animadversion, I shall state what *I know* concerning it.—The jury gave a recommendation in favour of the prisoner, setting forth their reasons for so doing; the Court made a report of a very different nature. As I have only seen the former, I cannot form, far less can I presume to deliver an opinion between these opposite sentiments of the Court and jury. My purpose then is but to show, that the case was accurately and fairly laid before his Majesty. It appears from Lord Sydney's letter to the Lord Advocate, of the 21st January, 1784, that Lord Kennet's 'report upon the case, the minutes of the trial, and the evidence given thereupon, together with the recom-

‘mendment of the jury,’ were laid before the King, 1686 who ‘having maturely considered the case of the convict, does not see sufficient grounds for extending his royal mercy to him.’ And Mr. Chalmers, the solicitor at London who corresponded with Mr. Bruce, the agent for the convict, writes to him thus: ‘The under secretary *‘showed me all the papers that had been transmitted from Scotland, and laid before the King.* Lord Kennet’s report states very accurately the circumstances of the case, and mentions the recommendation of the jury, and the grounds they went upon; but adds, that he and his brethren did not think Andrew a proper object of the royal mercy; giving the reasons, and *showing, that the arguments of the jury were not solid; in very distinct clear terms.*’—As the jury had a right to give a *recommendation*, so the judges were entitled to make a *report*; and no ground of complaint can arise from this case, unless it shall please jurymen to alledge that his Majesty is not at liberty to act according to his own judgement, in the exercise of the most sublime part of his prerogative,

But even supposing that improper means had been used to with-hold the royal mercy from Andrew, I cannot admit that this is any apology for the jury which sat upon Spence the matross, having pronounced a verdict finding him *not guilty*; for I consider him to have been a most unfit object of mercy; because from the recent and repeated outrages of the rabble, and instances of timidity in the civil magistrate, none of the crimes which arise from the avarice or malignity of *an individual*, are so hurtful to society as this *contagious* spirit of fire-raising and tumult.

1686 And this prisoner, Spence, was not only reckoned by the *spectators* of his trial, to have been proved guilty as a ringleader in the tumult, but also as having set fire to the distillery with his own hands.—Lord Kennet made the above report, relative to Andrew, as President of the Court of Justiciary, in absence of the Lord Justice Clerk. His acuteness of apprehension, his solidity of judgement, and his accuracy in business, were acknowldged when he was alive; and are now *sealed* by the united regret of the Bench, the Bar, and the Public.



## OF PIRACY:

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*Trial of Captain Thomas Green, Commander of the Worcester, a Ship belonging to the English East India Company, and of Fourteen of his Crew, for Piracy and Murder, committed on a Ship and its Crew on the Coast of Malabar.*

THE opposite lights in which the Parliaments of 1705 England and Scotland viewed the institution of the Indian and African Company, in the latter of these kingdoms, and the ferment which arose in Scotland upon the ruin of this Company, and the loss of its settlements, have already been mentioned.\* The contests between the English and Scottish Companies trading to the East Indies, excited further animosities between these nations. The Annandale, a ship belonging to the African Company, had been seized in the Downs by the English East India Company, and the pressing instances with which the former solicited its restitution being disregarded, they procured an order from Government in Scotland, for seizing, by way of reprisal, this vessel the Worcester, which had arrived in the Forth. The vessel was conducted to the harbour of Burntisland. She was detained there in virtue of a precept from the Scot-

\* See the Trial of Thomson and Auchmouty, p. 104.

1705 tish Court of Admiralty; and an action was brought before that Court, at the instance of the African Company, for having the ship declared a lawful prize, on account of the East India Company's unjustly seizing and confiscating the Annandale.

While the Worcester lay thus under an embargo, the unguarded speeches of the crew, in their cups or their quarrels, led them to be suspected of the crimes of piracy and murder committed upon a vessel and its crew in the East Indies, belonging, as was supposed, to one Drummond, a Scotchman.\* The suspicions thus entertained were the cause of a precognition being taken of the affair, and the presumptions of guilt arising from this precognition, were so strong as to give occasion to the following trial.

On the 13th of February, 1705, an act of the Scottish Privy Council was passed, authorising a prosecution against Captain Green and his crew, before the Court of Admiralty, and ordaining the Lord Chancellor to make application to her Majesty for a pardon to Charles May, surgeon, Antonia Ferdinando, cook's mate, Antonia Francisco, the captain's man, George Haines, steward, George Glen, quarter-master, and Alexander Taylor, foremast man.—The Privy Council, at the same time, appointed the Earl of Loudon, Lord Belhaven, Sir Robert Dundas Lord Arniston, Sir John Home of Blackadder, and John Cockburn, younger of Ormeston, assessors to Mr. Graham, the Judge Admiral.

\* Records of Admiralty, 5th, 13th, 14th, 16th, 21st March, 1705. De Foe's Hist. of the Union, p. 46. Trial of Captain Thomas Green, Edinburgh, printed by Thomas Anderson, A. D. 1705.

The prisoners were brought to the bar on the 5th <sup>1705</sup> of March, 1705. It was charged against them in the indictment, that, in the months of February, March, April, or May, 1703, they did meet with another ship bearing a red flag, and manned with Englishmen, or Scotsmen, on the coast of Malabar, nigh Callicut:—that they did, without any lawful warrant, or just cause, attack the said ship in a hostile manner, with guns and otherwise, boarded her, killed the men, and threw them overboard, took the goods from on board of her, and lodged them in the Worcester; and then disposed of the vessel thus piratically captured to one *Coge Commodo*. The indictment also contains a minute narrative of the circumstances from which the prisoners' guilt was inferred. But it were superfluous to insert them here, as they will appear with greater propriety in the evidence led in support of this prosecution.

A formidable band of counsel appeared both for the prosecutor and the prisoners; and the following objections to the relevancy of the indictment were stated, partly in written informations, and partly in pleadings at the bar.

It was pleaded for the prisoners, that the crimes libelled being alledged to have been committed by Englishmen on the coast of Malabar, this Court had no jurisdiction; and the prisoners ought to be remitted for trial to the proper courts of law in England. *2do*, That Henry Keigle, the ship's carpenter, and certain others of the crew who were indicted along with him, being part of Captain Green's crew, and under his command, could not be put upon their trial, till the Captain himself was previously tried. *3do*, That

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1705 Captain Green could not be tried till John Reynolds, and certain others of the prisoners who had received an indictment, should have undergone a previous trial; because he the Captain had them cited as exculpatory witnesses; and, in case of their acquittal, was entitled to their evidence in his behalf: otherwise the author of a groundless and invidious prosecution, while he raised an indictment against the principal offender, by also comprehending, in the indictment, the whole exculpatory witnesses as accomplices, might deprive a prisoner of the evidence in his defence. *4to*, That the libel was too general and indefinite, as it did not specify the name of the ship alleged to have been pirated, the designation of the Captain, the names of the persons said to have been murdered, nor any circumstance by which the ship in question might be specially distinguished: yet is requisite that all these be set forth in a criminal indictment, not only in point of form, but of material justice; for otherwise a prisoner might be precluded of many solid defences, such as, that the ship said to have been pirated, was in an opposite quarter of the globe; that she still remained in possession of her lawful owners; that the persons alleged to have been murdered were still alive, &c. That it was the more necessary that the prosecutor should be obliged to specify the ship particularly, as the prisoner, Captain Green, having a commission under the Great Seal of England, empowering him to act in hostility against pirates, might actually have taken or destroyed a ship and killed the men, without having done any thing contrary to law. *5to*, That the indictment was laid in such manner, as to show that the

prosecutor meant to establish the prisoner's guilt, 1705 not by positive testimony, but circumstantial evidence; and that the circumstances charged in the indictment were not such as necessarily to infer a conclusion of the prisoner's guilt. And, indeed, to hold a crime to be proved by circumstantial evidence, was extremely hazardous, and what many lawyers deemed illegal.

To these objections to the relevancy of the indictment, it was replied by the counsel for the prosecution, *1mo*, That the jurisdiction of the Court was established by act 1681, cap. 16. which declares, that the High Court of Admiralty has the sole jurisdiction, in all maritime causes, civil and criminal, and against all persons foreign or domestic.—And, independent of this statute, this Court must possess a jurisdiction over the prisoners in the crime of piracy; for, if pirates are not liable to be tried in the country where they are apprehended, this class, the most lawless and desperate of men, would escape without punishment or even trial, unless they happened to be apprehended in a country of which they were natives, or where the crime was committed. *2do*, and *3tio*, That the plea which had been urged in behalf of some of the prisoners, that they could not be tried till their Captain had undergone a previous trial; and the Captain's plea, on the other hand, that he could not be tried before certain of his crew, was a notable example of arguing in a circle; and, by admitting such objections as this, where more than one person was accused in an indictment, criminal process might be altogether stopped: that such of the prisoners as were of Cap-

1705 tain Green's crew, could not plead the authority of  
 ~~~~~ their Captain, to exculpate them from the charge  
 in this indictment, for no warrant could authorise
 piracy; and the prisoners were all indicted as *socii*
criminis.—And although, if a prosecutor should adopt
 a measure so extraordinary, so villanous, as to
 comprehend both the alledged perpetrators, and the
 exculpatory witnesses, in one indictment, with a
 view to preclude the accused of their defences, this
 might entitle the alledged perpetrators to insist upon
 those of the defenders whom they were to summon
 as witnesses being previously tried; yet it behoved
 the perpetrators to specify a probable ground of
 the innocence of these intended witnesses; but the
 prisoner, Captain Green, had set forth no such ground
 of the innocence of those of his crew whom he
 proposed to adduce as evidence. 4to, As to the
 objection of the libel being too general and indefinite,
 it was laid as specially as the circumstances of
 this remote crime would admit.—Piracy and murder
 were equally such, and alike punishable by the laws,
 whatever might be the names of the vessel pirated,
 and the persons murdered, or whatever nation they
 might belong to.—By admitting an opposite doctrine,
 it might be maintained, that a ship might be
 attacked and sunk, and her crew murdered, in the
*Road** of Leith, before thousands of spectators on
 the opposite shores; and yet, although the evidence
 of this act of violence was so notorious, it could
 not be the foundation of a trial, if the perpetrators
 should have accomplished their vil-

* The place where vessels ride at anchor off Leith harbour.

lany so completely, as to have utterly destroyed the ship and her crew, and to have sent them both to the bottom of the deep. Neither was it requisite that the libel should be more minute as to time and place. In a piracy committed in the Indian ocean, where the total destruction of the sufferers rendered the proof of guilt extremely difficult, it was impossible to specify the precise latitude of the ship, or the day of the month when the crime was committed. Indeed, the day and place of the commission of a crime were not necessary to be specified in an indictment, unless they were charged as aggravations of the guilt; such as that the crime was committed of a Sunday, or against a person in his own house; and, if a defender should require that day and place be specified, because he means to prove an *alibi*, it must be upon condition that he admit the crime charged in the indictment to have been actually committed, although he, by reason of the *alibi*, can instruct, that he was not the perpetrator. And the commission, under the Great Seal of England, which Captain Green possessed, far from rendering a more special *condescendence* necessary, would, in the course of the trial, afford a strong presumption of the prisoner's guilt; for the commission required, that the Captain should keep a particular journal of any hostile attack he should make upon any vessel; and, by the journal produced by the prisoners, it did not appear that he had made any such attack.

The Court repelled the objections to their jurisdiction, and also the whole objections stated against the relevancy of the indictment; and found, that the same being proved, ‘*by clear and plain evidence*,

1705 'relevant to infer the pains of death and confiscation
~ 'of moveables.'

THE PROOF.

Antonia Ferdinando, cook's mate of the Worcester, a Black, deposed, that he believed in God, was born of Christian parents, and was himself a Christian:—That, about two years and a half ago, he came aboard the sloop belonging to Captain Green, the prisoner's ship, then on the Malabar coast, and entered into the service of Mr. Loveday the purser. When sailing on that coast, he saw an engagement between the Worcester, her sloop, on board of which the deponent was, and a ship manned with white men, speaking English, and bearing English colours; that is to say, colours of white, red, and black, such as the Worcester did bear.—Captain Green, Captain Madder the first mate, James Simpson the gunner, and others, to the number of about twenty men, manned the sloop. The sloop engaged the strange ship first, and the Worcester joined the engagement afterwards. It was a running fight of three days, and happened between Tellicherry and Callicut. On the third day those in the sloop boarded the strange ship, took her crew from under the deck, killed them with hatchets, and threw them overboard; and the said prisoners, Green, Madder, and Simpson, were among those who boarded the strange ship and killed the men. The deponent believes, that the men so killed, and thrown overboard, were about ten in number. There were but few goods in her; these were carried aboard the Worcester,

and consisted partly of China-root; and the vessel thus captured was manned by some of the Worcester's crew, carried to Callicoiloan, and there sold for the service of a Malabar King, to a man bearing a Malabar name, and whose servant was called *Coge Commodo*.—He knew not what men, or whether any belonging to the Worcester or her sloop were killed; but he the deponent was wounded in the arm, and now shows the wound in Court.—Captain Madder said to the deponent, that, if ever he told any man, either white or black, of this engagement, he would throw the deponent overboard.—Deposed, That, during the engagement, Reynolds, the second mate, was ashore at Callicoiloan, as the deponent believes.—This deposition is subscribed by the deponent in the Malabar character, and by Captain George Yeoman, merchant in Dundee, his sworn interpreter.

Charles May, surgeon to the Worcester, deposed, That he sailed with this ship from England. When the vessel was on the Malabar coast, he was set ashore at Ibeck, and went some miles up the country to Callicoiloan. About a fortnight after, he heard firing at sea; and meeting with *Coge Commodo*, merchant, and Francisco de Olivera, interpreter to the Worcester, who had come that day from Ibeck, he asked them what meant the shooting? and they said, that the Worcester had gone out to sea, and was fighting with another ship. Next morning the deponent went to the shore, where he saw the Worcester riding at her former birth about four miles from the shore, and another vessel riding at her stern. Soon after, the Worcester's long boat came ashore in great haste; the deponent asked the boat's crew what had

1705 brought them ashore, it not being usual for boats to come over the bar, on account of the greatness of the surge? and they answered, that Captain Madder had sent them for a *pinguetta** with water, *because all their water had been spilled or staved the night before*. The men told him they had brought in a ship with them, but he did not speak to them in relation to any fight, for he made no stay, but returned immediately to Callicoiloan, where his patients were. About five or six days after, he went aboard the Worcester for some medicines, and saw the decks lumbered with goods in chests and bales. He said to Mr. Madder, ‘What have you got there; you are full of business?’ upon which Mr. Madder cursed him, ‘and bid him go mind his plaster box.’ There was a ship then riding at the Worcester’s stern, which the deponent was afterwards informed was sold to Coge Commodo. Some time after this the Worcester’s sloop came down the coast, and Antonio Ferdinando, the preceding witness, was sent ashore to the deponent at Ibeck. He was wounded in the arm; the deponent took off the dressings; and the wound was a fracture, which appeared to have been occasioned by a gunshot. He asked at Antonio who had dressed the wound and set his arm? and Antonio said, that he had been sent ashore at Cochin, and dressed by a Dutch surgeon. Some time after, he went aboard the Worcester and visited Antonio, and the other persons in the ship who stood in need of his assistance. A wounded man called Mackay, and another called Cumming, came to him at the medicine chest. He

* A sort of little boat.

asked them how they came by their wounds? and 1705
Mr. Madder hearing this desired the deponent to ask
no questions; and forbade the patients to answer him
upon their peril. An altercation immediately took
place between Mr. Madder and the deponent, who
told him, he had no command over the deponent.
Madder replied, he would make his complaint to one
who had; and an order was speedily given for carry-
ing the deponent ashore, and as speedily executed.
Deposed, That this happened in the month of Jan-
uary or February, 1703.

Antonio Francisco, a Black, servant to the prison-
er, Captain Green, deposed, That when he was a-
board the Worcester on the Malabar coast, he heard
the firing of guns from on board the Worcester, to
the number of six, or thereabout. The deponent
was at this time chained and nailed to the floor of
the forecastle; he had been so for about ten days;
and continued thus confined in all about two months.
Two days after he heard the firing, he saw some
goods brought aboard, which Antonio Ferdinando,
a preceding witness, told him had been brought out
of a ship they had taken. Ferdinando told him also,
that ten of the crew of the taken ship were killed;
and showed the deponent a plaster on his arm, say-
ing, he had been wounded aboard the Worcester's
sloop when she took the other vessel.

John Brown, shipmaster in Leith, deposed, That
he went on board the Worcester, by order of the
Lords of Privy Council, when the ship was unload-
ed, and saw the hatches, which were fast and sealed,
opened. Few or none of the packed goods were
numbered or marked, although it is customary for

1705 goods to be so; and he, the deponent, never received any goods but what were marked, so that he might know to whom they belonged. Being interrogated for the prisoners, he deposed, That this is customary whether there be a supercargo aboard or not; and whether the goods belong to ten men, or one man. Being farther interrogated for the prisoners, Whether it might be owing to the pepper being spoiled and heated, and the goods much damaged, that they wanted the mark? deposed, That, where the goods were damaged, the bales were rotten to pieces, but, where the goods were entire, the bales and packages wanted both nubmer and mark.

Archibald Hodge, shipmaster in Leith, deposed, he was on board the Worcester, when she was rummaged by order of the Privy Council, and saw the goods unloaded. Most part of them wanted both number and mark, which is nowise common or regular in any ship the deponent has ever seen, but he never saw an East India ship unloaded before.

John Glen, goldsmith, deposed, That last summer, the second day after the Worcester came into Leith Road, he went aboard that ship.—When in the cabin with Captain Madder and one Hammond, who is now in England, Madder took a seal out of his pocket, and asked the deponent what he thought of the *Scots African and Indian Company's arms*, and put the seal in his hand. It was about the size of a half-crown piece, had a handle of lignum vitæ; and there were engraved on it a St. Andrew's cross, a dromedary, with a castle on its back, a ship, with a rising sun above the helmet, and two wild men for supporters.

James Wilkie, tailor, deposed, That, in October 1705 last, after Captain Green's ship was brought into Burntisland harbour, the deponent went there with his mother, with a view to get intelligence concerning his brother, who had gone with Captain Drummond to the East Indies. The deponent fell in company with the prisoner George Haines, at the house of Mrs. Seton, and asked him, Whether he had seen Captain Drummond in the course of his voyage? Haines fell in a passion, and said, '*Damn me, what have I to do with Captain Drummond.*' The deponent dropped the conversation; but, after they had drank a while, and he thought Haines in better humour, he asked him, If he had not heard of, or seen any Scottish ship in the East Indies? Haines answered, *that, when they were upon the Malabar coast, they were informed by a Dutch vessel, that one Captain Drummond, commander of a Scots ship, had turned pirate, upon which they had manned their sloop, and made themselves ready in case of an attack; but they did not see Captain Drummond.* Deposed, That Haines added, he had in his custody when the Worcester was seized in Leith Road, what he would not have had to fall in the seizer's hand for twice the value of the ship;* and that he had thrown it overboard after the ship was seized, adding, '*Let them seek it now at the bottom of the sea.*'

William Wood, a gunner of her Majesty's artillery, deposed, That the prisoner George Haines, John

* By a confession and declaration which Haines afterwards emitted, it appears, that this which he was so anxious lest it should fall in the prosecutor's hands, was a private journal he had kept of the ship's proceedings.

1705 Henderson, writer in Edinburgh, and the deponent, were in company together at Burntisland, and had drunk hard. Haines fell into a melancholy fit, and Henderson inquiring the reason of it, Haines said, 'It is a wonder, that, since we did not sink at sea, that God does not make the ground open and swallow us up when we are come ashore, for the wickedness that has been committed during this last voyage on board of that old bitch,' pointing to Captain Green's ship. After this, he went a walking in Burntisland Links with Haines; and the deponent happening to mention to him, that Captain Madder's uncle was burned in oil for attempting to burn the Dutch ships at Amsterdam, Haines answered, 'If what Captain Madder had done, during this last voyage, were as well known, he deserved as much as his uncle had met with.'—John Henderson, writer in Edinburgh, deposed conform to the preceding witness, in every thing save the conversation that passed between the said witness, and Haines the prisoner, in Burntisland Links.—Ann Seton, in Burntisland, confirmed the preceding conversation, except that which happened between Haines and Wood in the Links.

Besides these depositions, the prosecutor produced in Court Captain Green's journals, from which it appeared, that the most anxious and minute instructions had been given to Captain Green by his owners, that no letter should pass between them but in cypher, and that even these should be addressed to a third person; and that, during the voyage, no letters whatever should be sent by any of his crew to England.

The jury returned the following verdict: 'They, 1705
' by plurality of votes, find, That there is one clear
' witness as to the piracy, robbery, and murder, li-
' belled, and that there are accumulative and con-
' curring presumptions proven for the piracy and
' robbery so libelled: but find, that John Reynolds,
' second mate of the said ship, was ashore at the time
' of the action.' The Court, on the 21st of March,
sentenced Captain Green and four of his crew, to be
taken to the sands of Leith on the 4th of April, and
hanged till they be dead; four more of the crew to
suffer in the same place on the 11th of April; and
five more to meet the like fate on the 18th of that
month; and they dismissed John Reynolds from the
bar.

As the factions into which Scotland was then di-
vided about the depending treaty of Union, did each
of them take up this cause as a matter of party, the
faction which favoured the Union maintained the
prisoners' innocence, and on this ground solicited a
pardon for them. The party, again, that opposed
the Union, which was much more numerous, and
fully more violent, held the evidence of the prison-
ers' guilt as equal to demonstration, and resented the
attempt to obtain a pardon for the prisoners with the
highest indignation. Three of the convicts, Captain
Green, Madder his first mate, and Simpson the gun-
ner, suffered on the day appointed. The rest were
reprieved from time to time, and finally pardoned.
Green and Madder, some days before their execu-
tion, published a paper which they called their last
speech. In this they maintained their innocence; a
circumstance which makes no impression upon me,

1705 when I consider, that not only the Queen could pardon, but the Scottish Privy Council could relieve them, and that they entertained hopes of pardon till the last hour of their lives. On the other hand, three of the convicts, Linstead, Haines, and Bruckly, emitted, after sentence of death had passed upon them, judicial confessions and declarations, acknowledging that Captain Green and his crew were guilty of the piracy and murder libelled. And I must acknowledge, that I look upon this confession as entitled almost to as little credit as Captain Green's denial of guilt; for, as the latter built his hopes of pardon from the English faction, upon the declaration of his innocence, so the former might ground their expectations of mercy from the Scottish faction, upon flattering them, by confirming the guilt of Captain Green and his crew.

John Maciver and Archibald Macallum, Merchants in Greenock, for sinking and casting away of Ships, and piratically relanding and selling their Cargoes, after Entry in the Customhouse, for the purpose of Defrauding the Underwriters and the Revenue.

1784 THE prisoners were prosecuted before the High Court of Admiralty, at the instance of Ilay Campbell, Esq. his Majesty's Advocate, and John Monro, Esq. Procurator-fiscal of that Court. The indictment sets forth, That, by the common and statute law of this

realm, the wilfully casting away, sinking or otherwise ¹⁷⁸⁴ destroying of ships, for the purpose of defrauding the underwriters, or the revenue, and piratically relanding and selling, or otherwise disposing upon the cargoes of such ships, after these had been entered in the Customhouse for exportation, are crimes of a heinous nature, and severely punishable.* Farther, That, by an act of King George I. an. 4to, cap. 12. and by Geo. I. an. 11mo, cap. 29. it is declared, that whoever shall destroy, or procure to be destroyed, the ship of which he is an owner, officer, or mariner, to the prejudice of any person who may have insured the goods with which she was loaded, or of any merchant who may have goods aboard, or that of any owner of such ship, shall suffer, as in cases of felony, without benefit of clergy: yet, that the prisoners, upon one or other of the days of April, May, or June, 1781, being owners of the ship called the Endeavour, then in Greenock, did freight the vessel for Halifax in Nova Scotia, loaded her with a variety of goods for the said port, and insured them at London and Glasgow for a large sum upon the said destined voyage: that the prisoners did form a design of relanding the said goods in whole or in part, with a view to defraud the underwriters and the revenue; and, accordingly, did reland part of the said goods before the vessel left the Clyde: that the prisoners also formed an intention of destroying the ship, gave directions for that purpose to James Robertson, the master, and Neil Macallum, the first

* Records of Admiralty, 19th May, 14th, and 15th June, 1784.

1784 mate; and prevailed upon them by money, good deeds, or promises, to accomplish their wicked purpose. In consequence of this combination, the master and mate bored holes in the bottom of the ship; and, upon her being taken by an American privateer in the course of the voyage, two holes were found in her bottom, the one plugged up, the other open, and every thing ready for the final completion of the prisoners' purpose: notwithstanding all which, they sought and recovered from the underwriters the sums insured on the ship, to the amount of several thousand pounds.—The indictment also charged the prisoner, Archibald Macallum, with crimes of a similar nature, in relation to a vessel called the New York, bound for the ports of New York and Philadelphia. And, farther, that he did receive drawbacks and bounties upon certain goods which he had entered in the Customhouse, as part of the cargo of the said ship, for exportation, but which goods he did fraudulently re-land, and dispose of for his own use.

Counsel were heard at great length, and informations also were ordered upon the relevancy of the indictment.

It was contended in the information for the prisoners, that the acts 4th and 11th George I. upon which the indictment was laid, did not extend to Scotland. Many acts of Parliament, it was said, have been passed since the Union, which neither were meant to extend, nor could be construed to extend to this part of the united kingdom. This must be the case where an act is grafted upon statutes passed in England before the Union, and where

a mode of procedure was prescribed inconsistent with 1784 the forms observed in Scotland. Such, however, is the case of the statutes libelled on. They are a confirmation of sundry acts passed in England, respecting the destruction of ships, from the act Charles II. an. 22. cap. 11. downwards; all of which acts relate to each other, and form a progressive chain of the statutory law of that country. Further, the mode of trying offences against these laws prescribed by act 11th, George I. cap. 29. is totally inconsistent with the forms established in our Courts, which demonstrates, that these laws were never meant to extend to Scotland. Accordingly, in the case of *Lampro*, A. D. 1751, a solemn decision was pronounced by the Judge Admiral, after the most mature deliberation, finding, that the statutes 4th and 11th of George I. did not extend to Scotland: and the justice and propriety of this decision is confirmed by a subsequent act of Parliament, viz. George II. an. 26. cap. 19. ‘for enforcing the laws against persons who ‘shall steal or detain ship-wrecked goods.’ In this statute, which relates to the 4th of George I. founded upon in this indictment, it is enacted, that the same shall, in all things, remain in full force, save only in so far as it is altered by the present act, ‘*provided, that nothing in this act contained, shall extend, or be construed, to that part of Great Britain called ‘Scotland.’*’ The prisoners further maintained, that, supposing these statutes of 4th and 11th of George I. to extend to Scotland, the Judge Admiral has no jurisdiction to try any offence against them; for that such must be tried by a commission of oyer and terminer here, in the same manner as in England.

1784 It was next argued, that the facts charged against the prisoners, relative to the brigantine the Endeavour, were not relevant to infer even an arbitrary punishment against them. The libel itself did only charge the prisoner with an intention to cast away the ship; it was admitted, that the ship was not cast away; and an intention to commit iniquity is not a crime at common law, according to the well known brocard, '*Cogitationis poenam in foro nemo patitur.*'

In the information for his Majesty's Advocate, it was observed, that it would be matter of just regret, if the law of this country were so defective, that the perpetrators of such dangerous and foul crimes as those charged against the prisoners, could not be brought to punishment. By this alone, it was maintained, a repetition of such crimes could be prevented, and the honest merchant be established in the benefit of insurance; which he was in no small hazard of losing, by reason of the reiterated frauds of the prisoners and their associates, having excited a general suspicion and alarm in the underwriters, as to the fate of every vessel navigated from the Clyde.

Many statutes, no doubt, had been enacted since the Union, which did not extend to Scotland. But it was the province of judges to determine whether an act founded upon before them was general, or confined to a particular part of the united kingdom, by attending, *1mo*, To the purpose of the statute; *2do*, To the words in the enacting clauses.—The purpose, then, of this statute, is to prevent the wilful destroying of ships, to the prejudice of underwriters or merchants. This surely is no less immoral, no less pernicious on the north than the south of

the Tweed. To say that the Legislature meant only 1784 to protect England against this crime, is to accuse the counsels of Parliament of the extremity of caprice. But the caprice of so partial a law would be no less remarkable than its blindness and absurdity; for the English are truly alike exposed to the consequences of this crime, whether committed in the Clyde or in the Severn. Of this no stronger testimony can be afforded, than the facts which gave rise to this trial; the number of vessels which have been fraudulently destroyed by the prisoners and their associates* were indiscriminately insured at Glasgow and Edinburgh, at Liverpool and London.

As to the words of the statute, they are altogether repugnant to the prisoners' plea of its being limited to England. It is intituled, 'An act for enforcing and making perpetual an act of the twelfth year of her late Majesty, intituled, An act for the preserving of all such ships and goods thereof, which shall happen to be forced ashore, or stranded upon the coasts of this kingdom,—or any other of her Majesty's dominions; and for inflicting the punishment of death on such as shall wilfully burn or destroy ships.' Now, as this statute was enacted posterior to the Union, the words, 'upon the coast of this kingdom,' undoubtedly comprehended the shores of either England or Scotland. But vain as a criminal's plea might be deemed, who would urge that he did not fall under this statute, because the ship

* The prisoners, with Herdman, who was convicted of the same crimes on the 29th of June, 1784, and others, their associates, in this villanous traffic, are estimated to have defrauded the underwriters to the amount of L.80,000.

1784 he had pillaged or destroyed was forced ashore not
 ~~~~~ at the Coquet Island but at Eyemouth, the prisoners  
 have not even this to urge in their behalf; for it is  
 excluded by the subsequent part of the same para-  
 graph in the statute, viz. ‘*or any other of her Ma-  
 jesty’s dominions.*’ Thus, by the words of the act,  
 it is evident, that, before the prisoners can establish  
 their argument as to the limitation of the statute,  
 they must show, *that Scotland is no part of the Bri-  
 tish dominions.*—And by the said act of the fourth of  
 George I. it is declared, that this statute of the 12th  
 of Queen Anne, for preserving of stranded vessels,  
 and preventing the wilful destruction of ships, ‘*hath  
 been found, by experience, to be of great use and  
 benefit to the seafaring men and merchants of this  
 kingdom, and other his Majesty’s dominions.*’

Further, the whole words of the act, 4th of  
 George I. are dictated in the most general terms.—  
*If any owner of any ships shall destroy the same, to  
 the prejudice of any person, he shall suffer death.*—  
 Indeed, when it is intended that a British statute  
 should not extend to Scotland, its expressions are  
 not ambiguous or slovenly; for there is a clause de-  
 claring, either that it is only to have effect in Eng-  
 land, Wales, or Berwick upon Tweed; or, that no-  
 thing contained in the act shall extend to Scotland.  
 But no such restrictive clause is to be found in the  
 statute libelled on.—As to the case of Lampro quoted  
 for the prisoners, it was answered, that this was but  
 a single decision of a single judge: a decision so much  
 unlooked for, that even Lampro’s counsel had not  
 pleaded that these acts did not extend to Scotland;  
 but only that trial could not proceed upon them,

except by commission of oyer and terminer.—And 1784 that the Judge Admiral's jurisdiction to try offences against these acts, was established by Charles II. A. D. 1681, chap. 16. which vests in this judge a jurisdiction in all maritime causes, over all persons foreign or domestic.

The prisoners had also objected to the relevancy of the indictment against them, upon the common law, so far as respected the brigantine the Endeavour; for they pleaded, that all which had been charged against them, 'was an intention to destroy the vessel, which was never carried into execution. But this argument would not avail them; for, *1mo*, The guilt in them was completed, as far as it lay in them to accomplish it, by the instructions given by them to the master and mate to destroy the ship in the course of the voyage, so that she might not come to the hands of the persons to whom she had been consigned; and consequently the prisoners' embezzlements of her cargo might not be detected; a purpose equally accomplished, by the Endeavour's being captured by an American privateer. *2do*, Their purpose was accomplished, in so far as holes were bored in the bottom of the ship, by the prisoners' associates, the master and mate of the vessel, although they were not mad enough to let in the gulf, at a distance from shore, to the certainty of their being drowned. *3tio*, Their guilt was not bare intention, but was actually accomplished in so far, as the libel charged them with piratically and fraudulently relanding part of the cargo of the Endeavour, before she left the Clyde.

1784     The Judge Admiral pronounced a very long and minute interlocutor, sustaining the jurisdiction of the Court, and finding that the clauses libelled on, in the 4th and 11th acts of George I. did extend to Scotland: but, as the Endeavour was taken before the alledged intention of destroying her was carried into execution, finding, that this article in the indictment does not fall within either of the statutes; but that the offences charged in the indictment are relevant at common law to infer an arbitrary punishment: and finding the prisoner, Macallum's, destroying the New York, relevant to infer a capital punishment in terms of the acts.—His Majesty's Solicitor General then declared, that he restricted the whole of the libel to an arbitrary punishment.

### THE PROOF.

The counsel for the prosecutor proposed to produce in evidence the declaration which the prisoner, Macallum, had emitted in a civil action which was instituted against him by certain underwriters. The counsel for the prisoners objected, that this declaration could not be brought against him in a criminal process. The Judge Admiral repelled this objection. The declaration related solely to the New York.

John Carmalt, merchant in Greenock, deposed, That he heard the prisoners acknowledge they were in part owners of the Endeavour. In a few days after the proclamation was issued, offering a pardon to any person who would discover those concerned in casting away certain vessels, the deponent met the



prisoner Maciver, who asked him if he had seen 1784 the proclamation? and added, he was sorry he had not left the country five or six months before; for he had seen a cloud gathering, which would soon burst; and he was afraid that if Robertson, the master of the Endeavour, should come home, he would discover things not fit to be known. The prisoner, Macallum, informed the deponent he was in part owner of the New York. After advice came of this vessel's being lost, the deponent asked Macallum if he had sent his vouchers, in order to recover the insurance? but he answered he had not. In a fortnight he repeated the question, and got the same answer; upon which the deponent said, 'it did not look so well that he had not forwarded his vouchers, as the protest was come to hand.' Macallum told the deponent, that a box of books had been carried away from his warehouse, which increased the deponent's suspicions. He asked if the box was included in the bill of loading and general invoice, and if it was entered in the Customhouse? to which Macallum answered in the negative, saying, that, when Mr. Hunter should receive the accounts of what had happened, he would be surprised to find that no such box was mentioned in the invoice. The deponent desired Macallum to show him the bill of loading, as it would give him satisfaction to see whether this box was included in it or not. Macallum gave it to him; and, upon examining it, 'he found the box of books was included in it.' The deponent then said to Macallum, 'What will you do now; you will be utterly undone?' to which Macallum replied, he would find out a way to remedy

1784 that; upon which he took out of his desk a blank bill of loading, signed by Forlay, the Master of the New York; and he, and David Thomson, merchant in Greenock, in the deponent's presence, filled up the blank bill of loading; and Thomson deleted the articles from the copy of the Customhouse entries, and general invoice of the goods said to be shipped on board the New York. Then Macallum, with his own hand, filled up the articles, and omitted the box of books mentioned above; also four boxes of linens, and some other things which the deponent does not remember, all of which were included in the original bill of loading and general invoice, and also in a letter addressed to the merchants at New York, specifying the particulars of the cargo.—When this operation was performed upon the bill of loading, the prisoner, Macallum, wrote a letter to his correspondents at New York, desiring them to pay no regard to the first letter, which bore that the box of books, &c. were shipped for them, as they had not been shipped. But the second and last letter neither was sent, nor was ever meant to be sent, to New York, but was preserved, in case the first mentioned letter and invoice should be produced in evidence against Macallum. Deposed, That he heard Macallum say he had produced the false bill of loading, when examined before the Judge Admiral.—Macallum told the deponent he had sent the boxes of linens to one Miller at London.

William Horn, late mariner on board the Endeavour, deposed, That he went as a sailor in this ship from Greenock to Hallifax. About two days after they left Greenock they put into Kinsale; and

the vessel was taken in the course of the voyage by <sup>1784</sup> the *Swift*, an American privateer. The deponent heard John Mount, one of the crew, say, he knew this would be the case, for Captain Robertson had put into Kinsale to see whether it was 'a pine plug or an oak plug *that was put into the ship.*' She lay at Kinsale a fortnight, and no repairs were made on her during this time, *save paying her sides and tarring her wales.* Deposed, That the vessel became leaky three days before she was taken. The deponent and Alexander Barber were upon the watch about four in the morning; the weather was fine; Neil Macallum, the mate, came upon deck, threw himself upon the hencoop, and ordered the deponent and Barber to *rigg* the pump. They remonstrated, that it was uncommon to *rigg* the pump at that hour, and the vessel had been pumped at twelve at night, and was then dry. The mate, notwithstanding, insisted that the pump should be tried; and Barber and the deponent went and pumped for about three quarters of an hour ere they overcame the water. During this, the Captain and the mate took their turn in working at the pump; for the Captain, who was in bed when they fell to work, rose as soon as he heard the pump going: and from this time till the ship was taken, one pump was kept constantly going, and another occasionally, to assist it when it blew hard. On the morning on which it was discovered that the ship was making water, before day light, when all was quiet, the deponent went down into the cabin, 'and thought he heard like the noise of 'water rushing in under the *scuttle* in the cabin.'— He immediately told the mate, and offered to go

1784 down and look at it, but the mate forbade him, saying, he would go himself. He went down, and speedily returned, and called the deponent a damned rascal, for there was no water coming in under the *scuttle*. The deponent then went over the *quarter* on a rope, to see if he could discover the leak from the outside, but could not. Then the deponent and another of the sailors called Barber, went again into the cabin, and heard the gurgling noise which the deponent had done before; and from this they went to the pump, where they saw the water running into the pump-well abaft; but they minded the matter no more. The deponent and Barber informed the crew of what they had observed, and they were uneasy at the information. They went round the vessel on the outside, trying to discover the leak, but could not; then they expressed their fears to the Captain, and their wish that the vessel should be examined at the place where the deponent and Barber had heard the noise: but the Captain bid them look at the bow; and both he, and Neil Macallum, the mate, said, ‘*that, if the vessel should sink, the boat was large enough to carry them all to land.*’ The ship being captured by the *Swift*, an American privateer, both Robertson and Neil Macallum told the sailing-master of the *Swift*, that the leak was abaft in the *runn* of the *Endeavour*. Her crew were put on board the privateer; and the carpenter’s mate of the latter was sent to examine the leak. Upon his return to the privateer, ‘he told the *Endeavour*’s people that they ‘were all a parcel of damned rascals, for they had ‘been boring holes in the vessel.’ And, upon the crew’s asking what kind of holes they were, he an-

swered, that they had been made by an inch and half oggar, or a small bung borer. Deposed, That one day when he was 'making fun' with the second mate, he run off with his knife, and was going to hide it in the pump-well, when he observed a line fastened to one of the stanchels of the pump-well, and was going to take hold of it, but instantly Neil Macallum called to him to let it alone, asking him, what had he to do there? After the Endeavour was carried into Penobscot, he heard several of the crew, and in particular John Riddell, say, that *they had 'seen a plug in the pump-well:'* and one day when he was drinking in Halifax with John Mount, he told the deponent, 'it was lucky he did not pull the line 'he saw at the stanchell in the pump-well, for that 'John Riddell told him it was fastened to the plug.' Deposed, That, before they left Greenock, the prisoner Maciver, and Neil Macallum, came aboard the Endeavour one day about twelve o'clock, and brought a box with them, when there was nobody in the ship except the deponent and Murdoch Macleod. The prisoner desired them to go ashore, and get their dinner, and to return at three o'clock. They did so; and when they came back, the prisoner and Neil Macallum were gone. Thinking that they might have brought something on board to drink, the deponent and Macleod went into the cabin, and opened the box which the prisoner and Neil Macallum had brought on board, and found it empty: but, upon looking into the locker of the cabin, *they saw in it a large bung-borer, a small one, a gouge, and a chissel, and observed that part of the cargo abajt the pump had been moved to a greater distance from it, and other*

1784 *parts of the cargo brought nearer it.*—After the Endeavour was taken by the privateer, the deponent being sent for some things from the latter ship to the former, saw the carpenters stopping up the holes in the *rum* of the vessel, ‘which brought to the deponent’s mind some suspicions as to the use that had been intended by the bung-borer, &c. he saw ‘in the locker of the cabin at Greenock.’ When he returned on board the privateer, he understood that some conversation had passed between Captain Robertson and his crew respecting these holes, and that he had given a draught to John Mount for £20, and to Alexander Barber for £10, upon John Maciver and Company. On this the deponent went to Robertson, said he would expose him as soon as he got home, ‘and asked him *why he had not given the deponent money as well as the others?*’ Robertson answered, ‘he should certainly see him put to rights ‘when he arrived at Greenock;’ and added, if the deponent ‘*was to expose him, he, Robertson, might hang for it.*’—After the deponent’s return to Greenock, he went to Robertson, and asked him to fulfil his promise; upon which Robertson went with him to the prisoner Archibald Macallum, who gave the deponent £6. He insisted upon getting as much as the rest; but was at first offered only £5, and when the offer was raised to £6 he accepted of it. Deposed, That when the Endeavour lay in the Fairly, off the coast of Ayrshire, a large new boat came to her from Greenock, and masts and sails were made for it on the Banks of Newfoundland.

James Mackinnon, late mariner on board the Endeavour, deposed, That she sprung a leak four days

before she was captured by an American privateer. 1784  
 The deponent and the rest of the crew made search for it in the fore part of the vessel, but the Captain would not allow them to look for it abaft, saying, he had looked there himself. They set two pumps agoing; one of them they wrought constantly, the other occasionally. When the ship was taken, the crew were carried on board the privateer which captured them, and the Captain of the privateer sent his own carpenter into the Endeavour to search for the leak. After he had discovered it, and returned to the privateer, he said to Captain Robertson 'that he had 'intended to sink the vessel the Endeavour, as two 'holes of an inch and half womble-bore had been 'found in the after-peak of the Endeavour, which 'he had plugged up.' But Robertson said, 'that 'he had never bored any holes in the vessel.' Deposed, That the deponent was sent again on board the Endeavour; and after the holes were thus plugged up, she was as tight as ever. They were not within sight of land when the ship began to leak, but the weather was fine, the pumps kept the water at under, and the crew entertained no apprehensions. Deposed, That the prisoners were owners of the Endeavour.

James Horn, father to William Horn a preceding witness, deposed, 'he understood that the money 'given to his son was for wages, or for time lost by 'him when he was away.'

I am not able to discover the relation which the evidence given by the following witnesses bears to the trial of the prisoners for their fraudulent and criminal practices respecting the Endeavour, of which

1784 alone they were convicted by the jury, or the tendency it could have towards their conviction of that crime.

William Macintosh deposed, That he saw James Robertson, Captain of the Endeavour, have an acceptance of James Herdman's for £94 : 10 : 0.—Malcolm Jamieson deposed, That he was desired by Charles Munn to get £200 insured for James Robertson upon the ship the Albion, which he had got done accordingly; and he got from Robertson an indorsation to Herdman's bill for about £94.—Charles Munn deposed, That he was desired by James Robertson to go to Herdman, and get money from him to pay the premium upon the insurance of goods which he was to export in the Albion, and Herdman gave Robertson his bill for £94.—Archibald Campbell deposed, That Archibald Paterson, supercargo of the New York, in July last, sent him a promissory note for £100, signed by Archibald Macallum, and a receipt for £250, signed by Archibald Macallum and James Herdman.—Deposed, That insurances were made upon the New York and her cargo, at London and other places; *'but that none of the sums insured on the New York were recovered from the underwriters, that he knows of.'*—John Campbell, Esq. Justice of Peace for the county of Renfrew, emitted a deposition relative to a box of books found in the possession of the prisoner, Macallum; which box was brought before him as Justice of Peace, in an action at the instance of certain underwriters in London, against the owners of the New York.—Deposed, *'That sailors' wages are not due if the ship be lost or taken, unless as much of*



*the wreck be saved as is sufficient to pay them.*—1784 William Paton, bookseller, deposed, That he sold the above box of books to Archibald Macallum and Co.—Jean Forlay, sister to William Forlay, master of the New York, deposed, That, from some words which dropped from her brother when he was the worse of drink, she suspected the New York was ‘not going out upon a proper footing,’ and she advised him to have no concern with the voyage.—Alexander Stevens, a passenger on board the New York, emitted a deposition relative to that vessel, and to goods which had been relanded from her, but, upon a motion by the prisoner’s counsel, the judge ordered that this deposition, as to the relanding of goods from the New York, should be deemed no part of the evidence, seeing that this branch of the indictment was not found relevant; because no part of the money insured upon this vessel was received from the underwriters. Stevens also deposed as to the manner in which the New York was lost or cast away.—Angus Maclean, late mariner on board the New York, deposed, That the ship struck on a sand bank, on a fine clear evening, about eight o’clock; and that he heard William Moore the mate say, ‘He knew well enough that the vessel was to be lost.’

The jury unanimously found the prisoners, Maciver and Macallum, ‘*guilty as far as regards the brigantine the Endeavour*; and they all in one voice, ‘find the charge not proved against the pannel, ‘Archibald Macallum, as far as regards the brigantine New York.’

1784. The Solicitor General craved judgement upon this verdict, The counsel for the prisoners objected, that no judgement could pass upon it, as one of the jurymen had gone out of Court, and may have had conversations with various persons during his absence; and, therefore, the prisoners ought to be immediately acquitted, and dismissed from the bar.— It was replied for the prosecutor, that during the necessary absence of this jurymen, on account of his health, the taking of the evidence was stopped, and that he had no conversation with any person when out of Court. This being verified by the maces\* who attended him, the Court repelled the objection.

Judgement was then passed upon the prisoners, declaring them infamous persons; ordaining them to stand an hour on the pillory, in the city of Glasgow, on the eight day of July, with a label on their breast, denoting, that they had procured holes to be bored in the Endeavour to defraud the underwriters and then to be banished Scotland for life.

Against this sentence the prisoners presented a bill of suspension to the Court of Justiciary. The reasons of suspension were those which have been already stated against the relevancy of the indictment, and which were over-ruled by the Judge Admiral. Other objections were also urged against this judgement, viz. the allowing of Macallum's declaration, emitted in an action merely civil, to be received as part of the evidence, which ought by no means to have been laid before the jury, *the*

\* Mace-bearers.

*generality of whose verdict, in finding the prisoners* 1784  
*'guilty, as for as regards the brigantine the Endeavour,'* was highly improper—The circumstance of one of the jurymen being out of Court while the trial was going on, which the prisoners contended did nullify the whole proceedings—The Judge Admiral's having pronounced a sentence ordaining them to be pilloried at Glasgow; for he had no jurisdiction but within flood-mark—And, *lastly*, That even supposing the prisoners guilty, the sentence was by much too severe; for, considering the temper of the times, it would probably be productive of their violent and inhuman deaths.

To these the following answers were made by the prosecutor: to the objections against the relevancy of the indictment, the arguments in support of it, which had been already stated to the Judge Admiral, were submitted to the Court of Justiciary.—As to the iniquity of admitting Macallum's declaration as a part of the evidence, it was answered, that extrajudicial and private conversations might legally be brought in evidence against a prisoner; therefore, much more might Macallum's guarded declaration which he had emitted before a respectable judge be received in proof against him. But, even supposing this to be improper, the prisoners can have sustained no injury by it; for Macallum's declaration related solely to the New York, and the jury had acquitted him of the charge respecting that vessel.—As to one of the jurymen's having retired for a while out of Court, the same answer was made which had been urged before the Court of Admiralty.—It was observed, that the plea of the Judge Admiral's having

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1784 no jurisdiction to pronounce any sentence but what was to be executed within flood-mark, was, indeed, a curious one. The statute of Charles II. A. D. 1681. chap. 16. bestowed on the Court of Admiralty an ample jurisdiction; and the practice of the Court, as exemplified in the case of Lampro, justified this mode of pronouncing sentence.—As well might the suspenders have alledged, that the Judge Admiral could hold no Court but within flood-mark, and issue no warrant for apprehending a prisoner, unless he should be found within flood-mark.—*Lastly*, That the sentence was by no means too severe for those who could form such a profound scheme of pernicious villany; and, as to the prisoners falling a sacrifice to the rage of a mob, the magistrates of Glasgow would, no doubt, ‘take care that no improper excess should be committed.’

The Court of Justiciary pronounced the following judgement: ‘Find, That the statutes of the 4th and 11th of George I. libelled on do not extend to Scotland; but find, that the libel, as laid upon the common law, was rightly found, by the interlocutor of the Judge Admiral, revelant to infer an arbitrary punishment;\* and find, that the verdict of the jury, as applied to that interlocutor, does warrant the judgement of the Judge Admiral which passed upon it: and, upon considering the atrocity and dangerous nature of the crime so charged and proved against the complainers, find there is no just ground for mitigating that judgement; and repel

\* Records of Justiciary, July 14, 1784.

'the whole reasons of suspension, and refuse the 1784  
'bill.'

I am happy to observe, that this distinction which their Lordships thought themselves obliged by law to make between the commission of so atrocious and dangerous a crime in England, and in Scotland, is about to be done away: For, by a bill for regulating the jurisdiction of the Court of Admiralty in Scotland, which I am informed has just passed the House of Commons, and which will probably receive the sanction of the other branches of the legislature, the statutes libelled on, relative to the destroying ships, are declared to extend over both parts of the United Kingdom.

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When I formed, and had in part executed, the plan of this work, I was not aware that I should have so frequent occasion to exercise the presumptuous and irksome duty of delivering my own remarks; but consistency with the general purport of this work, and perhaps propriety also, require me to make an observation upon this verdict of the jury, in which I suppose the reader has preoccupied me, The indictment charged the prisoners not only with procuring holes to be bored in the Endeavour, in order that she might be destroyed, but also with fraudulently relanding part of her cargo before she left the Clyde. The jury found the prisoner guilty, *in as far as regards the Endeavour.*—Now, in the whole of this trial, there is not a word of evidence relative to the relanding of goods from that ship.—

1784 I mention this with the less reluctance, as, from the respectable character of the persons who composed this jury, it is impossible that any blame can lie upon them, except merely that of inaccuracy.—In this country, which is a land both of liberty and law, juries cannot too cautiously attend to the nature of their important, their *sacred trust*: for they are equally distant from the discharge of their duty when they acquit a criminal in contempt of law and of evidence, and when they indiscriminately find a prisoner guilty of the charge in the indictment, although the proof applies but to part of the charge.

## OF FORGERY.

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*Mr. George Henderson, Merchant in Edinburgh,  
and Margaret Nisbet, Wife of Alexander Macleod,  
Wigmaker in Leith, for Forging a Bill upon the  
Duchess of Gordon.*

THE time which according to the forms of our law, 1726 and the occult nature of this crime, is consumed in proving of a forgery, has occasioned trials for this offence generally to be taken before the Court of Session; because, in the Court of Justiciary, after the jury is appointed, and the evidence begun to be led, the whole must be completed, and a verdict pronounced, ere the jury are suffered to dismiss.

As the criminal jurisdiction of the Court of Session does not amount to the power of awarding sentence of death, the following mode of procedure is observed. When the forgery appears to the Court to be of so deep a nature as to deserve a capital punishment, they declare the deed in question to be reduced, as being false and forged; and remit the prisoner to the Court of Justiciary: this sentence is called a '*Decreet of Reduction and Improbation, and Act and Remit.*' The prisoner is then served with an indictment, setting forth, that he had committed forgery; that he had been found guilty of the same by

1726 sentence of the Court of Session; and that, upon this being found proved by a jury, the prisoner should be condemned\* to suffer death, and confiscation of personal estate. The decree of the Court of Session, declaring the forgery, is then read over before the jury; it is held complete legal evidence, or what is called *probatio probata*, against the prisoner, who is thereupon convicted and condemned.

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In the beginning of May 1726, it was discovered \* that one Petrie, a town-officer in Leith, held the Duchess of Gordon's bill for £58, which had been delivered to him, blank indorsed, by Mrs. Macleod, as a security for £6, for which sum her husband had been laid in prison. The bill was drawn by George Henderson, accepted by her Grace, indorsed by Henderson the drawer, to Mrs. Macleod, and blank indorsed by Mrs. Macleod; and in virtue of this blank indorsation Petrie the town-officer held it. The holder of the bill was apprehended and brought before the magistrates of Edinburgh: In a few days after Mrs. Macleod and Mr. Henderson were also brought before them. It was manifest that the Duchess of Gordon's acceptance was a forgery; but the point in dispute was, whether this forgery was contrived by Mr. Henderson the drawer and indorser, or Mrs. Macleod the indorsee.

\* Extracted Decreet of the Lords of Session, in the archives of Justiciary. Records of Justiciary, January 23, and February 4, 1727.



Upon the 5th of May, Petrie was brought before the magistrates, and told the manner in which he came by the bill. Henderson was at the same time brought before them, who denied all knowledge concerning it. Mrs. Macleod was apprehended on the 7th, and examined; and she and Henderson being confronted with each other, the former did judicially declare, that the bill, and other deeds challenged, were written by Henderson; who judicially denied all knowledge concerning them. Upon which, both Mr. Henderson and Mrs. Macleod were committed close prisoners.

A complaint against Mr. Henderson was presented to the Court of Session by Duncan Forbess of Cullo-den, Esq. his Majesty's Advocate, setting forth that the prisoner, Henderson, had counterfeited the Duchess of Gordon's acceptance to a bill drawn by himself for £53: That upon being informed, on the 3d of May, of the bill's being intimated to her Grace, he struck himself upon the breast, and exclaimed, ' All ' would be ruined!' And that, upon his being told of the Duchess of Gordon's declaring she had no concern with the bill, he granted a fresh obligation for the sum, and subscribed the same before witnesses. And, therefore, craving their Lordships to take trial of these facts; and, upon their being proved, to inflict upon Mr. Henderson an adequate punishment.

A complaint also against Mrs. Macleod was presented to the Court, at the instance of Mr. Henderson, setting forth, that she had counterfeited the above acceptance of the Duchess of Gordon, had deposited in the hands of William Petrie the bill so accepted in security for £6; and that, when the bill came to

1726 be challenged as forged, she counterfeited an obligation, bearing to be subscribed by Henderson before two witnesses, for £58, being the amount of the said bill.—It was not without great reluctance that his Majesty's Solicitor General, in absence of the Lord Advocate, did grant his concurrence to this complaint.—Mr. Henderson also raised a summons of *Reduction and Improbation* of the deeds produced, said to be written by him.

Mr. Henderson, in his complaint against Mrs. Macleod, alledged, that the bill was not fabricated by him; for, *1mo*, The name of the drawer adhibited to it was not of his hand-writing, nor did it bear any resemblance to it. *2do*, He had no acquaintance nor dealings with the Duchess of Gordon, so as to give a plausible colour to a forgery upon her Grace. *3tio*, He had no acquaintance nor dealings with Mrs. Macleod, to whom the bill is indorsed, nor did he ever see her save once, about three years ago; although Mrs. Macleod, with an effrontery acquired by '*proper habits*,' has been pleased judicially to declare, in presence of their Lordships and of himself, that it was he who indorsed to her this bill. *4to*, That he did not grant her an obligation to pay the sum of £58, when it came to be discovered that the bill was a forgery. And, *ultimo*, That, on the 3d of May last, when he is said to have subscribed that obligation in a house in the Canongate, in presence of witnesses, he was not without the *Ports* of Edinburgh during the whole day; and at the hour of the evening at which it is alledged the obligation was subscribed, he was engaged with company in his own house.

On the other hand, the Lord Advocate, in his com-

plaint against Mr. Henderson, and Mrs. Macleod, in her answers to the complaint at Mr. Henderson's instance against her, set forth, *1mo*, That the bill produced in process was a forgery, which, indeed, was acknowledged on all hands; and so clumsily was it executed, in so far as it respected the acceptor, that it had but the half of her name, the first part being entirely wanting: for it was signed *Gordon*, without the Christian name *Eliza*, which was neither the usual manner of her Grace's subscription, nor that of any Peeress, except of those which are such in their own right, and not in right of their husband. *2do*, Mr. Henderson did *use this forged bill*, by delivering the same to Mrs. Macleod, drawn, accepted, and indorsed, as it now stands. *3tio*, That, when Mr. Henderson was told of the bill being intimated to her Grace, he struck himself on the breast, and said, 'All would be ruined!' *4to*, He denied his having been in company with Mrs. Macleod for some years; whereas it would be proved, that, on the night of his granting her the obligation for £58, they were in company together in the house of John Gibson, wright in the Canongate, in presence of several witnesses. *5to*, That, when the bill was discovered to be a forgery, he wrote a letter, now produced, to William Petrie, holder of the bill, requesting him to delay seeking payment till Saturday, when he, the prisoner Henderson, should take up the same. *6to*, That he granted his obligation to Mrs. Macleod, the indorsee, for the amount of the said bill. *7mo*, That the cause of the bill's being indorsed to Mrs. Macleod was as follows: She and her husband had taken a large house in Leith as a tavern, furnished

1726 it suitably, laid in a stock of liquors, and given the charge of them to Helen Nimmo as housekeeper.— Mrs. Macleod having occasion last harvest to be a considerable time absent from her own house, upon her return, and settling accounts with Helen Nimmo, the housekeeper, she found that Nimmo, by deficiency in the cash which she should have delivered to the prisoner, Mrs. Macleod, and by embezzlement of her liquors and linens, had incurred a debt to her of L.58. She threatened to take out a warrant against her, but desisted, upon *Nimmo's declaring that she would get Mr. George Henderson to satisfy and pay Mrs. Macleod.* Accordingly, Mr. Henderson came to Mrs. Macleod's house, and offered her his bill for the amount; but she declared that he must find somebody who would be conjunct with him in the bill. Soon after, Mrs. Macleod discovered that Nimmo the housekeeper was with child, and she threatened *to inform the kirk-session,\** upon which Mr. Henderson came to Mrs. Macleod the very next day, and indorsed to her the bill now lying in process; then took away Nimmo out of her service, and sent her to England (as was supposed) to be delivered of her child.

Both Mr. Henderson and Mrs. Macleod emitted judicial declarations before the Lords of Session; and, upon the 30th of June, a signed information being given in to the Court by Mr. Henderson, that one David Household, *alias* Cameron, was the actual

\* As ghosts were formerly the bugbear which was made use of to frighten children, so the kirk-session was the bugbear to frighten grown persons. The one was to be terrified on account of the *flesh*, the other on account of the *spirit*.

forger of the deeds produced, their Lordships granted 1726  
ed warrant for apprehending him wherever he could  
be found. The Lords ordained both complaints to  
be conjoined; and the examination of witnesses be-  
gan upon the 8th of July.

### THE PROOF.

John Gibson, wright in the Canongate of Edinburgh, deposed, That he knew Mr. Henderson presently at the bar, having seen him several times, and been once in company with him. Deposed, That, on the 3d of May last, about nine at night, as he was going down the Canongate, he met Mr. Henderson and Mrs. Macleod, who went along with him to the deponent's house; he there saw Mr. Henderson sign the obligation to Mrs. Macleod now exhibited; the deponent read it over, and signed as witness to Mr. Henderson's subscription; and the deponent's two daughters and Archibald Dempster were present. Part of this deed was written before the deponent saw it; but the last part of it, viz. from the following words, 'before these witnesses,' downwards, was written with Mr. Henderson's own hand in the deponent's presence. They staid in his house almost an hour; and, during this time, Mr. Henderson repeatedly desired of Mr. Macleod *that she should de-*  
*lay and keep herself quiet till Saturday, and she*  
*should have her money;* which she refused to do 'unless he signed the obligation.' Mr. Henderson, Mrs. Macleod, and the deponent, then went down the Canongate together. When they were before Deacon Lauchlan's house, 'Mrs. Macleod told Mr.

1726 ‘ Henderson she had intimated the bill to the Duchess’s gentleman; whereupon he, Henderson, clapped upon his breast, and said, ‘ O, good God, that is all wrong; why have you done so?’ and upon this he immediately left them. Deposed, That Mr. Henderson had on dark coloured clothes and a black wig, such as he now wore. And being interrogated, If he knew one David Household, *alias* Cameron? deposed, He knew no such person.

Archibald Dempster, servant to James Aitkin, wright, deposed, That, on the 3d of May last, after nine at night, he was sent for by John Gibson, the preceding witness, to his house. He found there Mr. Henderson, Mrs. Macleod, Gibson, his wife, and two daughters. Henderson was then writing a paper, which the deponent saw him subscribe; Gibson signed as witness to the deed, and desired the deponent to do the same. He hesitated, lest it might be the cause of his afterwards being taken from his work, or of otherwise being brought to trouble. But ‘ Mr. Gibson said, it was no more but *an obligation which Mr. Henderson was giving Mrs. Macleod for some money, and that he would pay against Saturday*, and the deponent would get no trouble about it;’ upon which he signed as witness, and then went immediately to his master’s house. Being interrogated, deposed, That he never saw Mr. Henderson before that night, nor since, except once about three weeks after, when he, Mr. Henderson, was brought before the magistrates of Edinburgh. And deposed, That he thought Mr. Henderson, presently at their Lordships’ bar, was the same person whom he saw in Mr. Gibson’s, and afterwards be-

fore the magistrates. Deposed, That Mrs. Macleod 1726 did not speak to him, farther than asking his name, and bidding him take a drink.

Christian Gibson, daughter of John Gibson, wright, deposed, That, on Tuesday the 3d of May last, between nine and ten at night, she saw ‘ Mr. George ‘ Henderson, the same person that is at present in ‘ the bar, in her father’s house, and did see him finish a paper, by adding two lines thereto, and saw ‘ him subscribe the same;’ and her father and Archibald Dempster signed as witnesses. There were also present in the room when the deed was signed, Mrs. Macleod and the deponent’s sister; but her mother was not present, having gone out to see a sick child. Deposed, She heard Mr. Henderson say, ‘ that the ‘ money should be paid against Saturday,’ and saw him deliver the deed to Mrs. Macleod, who put it in her breast. The deponent never saw Mr. Henderson but at that time, and when he was brought before the magistrates.

Catherine Gray, servant to Alexander Hope, tailor in Canongate, deposed, ‘ That she had frequent occasions of seeing and knowing George Henderson ‘ at the bar; and, particularly, on the 3d of May ‘ last, on which the Deacons of the Corporations of ‘ the Canongate were chosen, she did see the said ‘ George Henderson, prisoner, about nine o’clock at ‘ night, coming up the Canongate in company with ‘ Mrs. Macleod, the other prisoner; and, a little above ‘ the Canongate Cross, she did see them meet with ‘ John Gibson; and the deponent having asked Mrs. ‘ Macleod, If she had got payment of her money ‘ due to her by Mr. Henderson? the said Mrs. Mac-

1726 ' leod answered, that she was just going to get security for it.' Being interrogated for Mr. Henderson, deposed, ' That she did not know, and, to her knowledge, did never see, the person named ' David Household.'

Catherine Falconer, *indweller*\* in Edinburgh, deposed, ' That, upon the third day of May last, being ' the day on which the *Trades* of Canongate elected ' their Deacons, she, on the evening of that day, ' after nine at night, did see Mrs. Macleod, prisoner, ' walking up the Canongate, and, before her, she saw ' walking John Henderson, prisoner at the bar, and ' John Gibson. Deponed, that, upon her meeting Mrs. ' Macleod, as said is, she the deponent asked where ' she was going? to which Mrs. Macleod answered, ' she was going to John Gibson's house to receive security for a debt due to her by George Henderson.'

Janet Lyle, *indweller* in Edinburgh, deposed, That she knew one Helen Nimmo, who was servant to Mrs. Macleod; ' and she did hear Mrs. Macleod, ' particularly about the end of last year, say to Helen Nimmo she was much in arrear to her; to which ' Helen replied, that *the mistress might be easy, for she knew of a paymaster, viz. Mr. Henderson.* Deponed, That, towards the end of last year, the deponent having frequent occasion to be in Mrs. ' Macleod's house, she did sometimes see in the cellar with the said Helen Nimmo, a gentleman like ' to Mr. Henderson at the bar; but cannot be positive it was he, having no particular acquaintance of him.'

\* Inhabitant of, householder in,



William Petrie, town-officer in Leith, deposed, 1726  
 That, on the 5th of February last, Mrs. Macleod delivered a bill to him for £58, which was drawn by Mr. Henderson, and accepted by the Duchess of Gordon, indorsed by Mr. Henderson to Mrs. Macleod, and blank indorsed by her. She gave this bill to the deponent *‘in security for £6 1s. which he advanced to her in order to relieve her husband, Mr. Macleod, out of prison.’* Deposed, he knew nothing as to the verity of the subscriptions, farther than Mrs. Macleod said it was a true bill. ‘To the best of his remembrance, she said the cause of her getting that bill was tea and other goods she had furnished Mr. Henderson.’ Deposed, That, about three years ago, Mrs. Macleod delivered to him (in security of a debt she owed him, a bill for £38, or £40, drawn in the same manner by George Henderson, and accepted by the Duchess of Gordon, and that Mrs. Macleod paid him punctually the sum she had borrowed upon the pledge of this bill, and got up the same; and she made use of this as an argument for the deponent’s advancing her the £6 upon the bill produced in process. The deponent did not demand payment of the bill from the Duchess of Gordon, for he was prevented from doing so during the whole month of April, by Mrs. Macleod’s telling him, that the Duchess was then occupied with her devotions, and that her gentleman, Mr. Gordon, was in the North, upon whose return the bill would be paid. She added, that she had been to wait upon her Grace, had been kindly entreated, and had got a glass of some liquor out of the Duchess’s hand.—At last, the deponent became suspicious about the

1726 verity of the bill; and he told Mrs. Macleod, that, unless she got a letter from Mr. Henderson, declaring the verity of the bill, he would protest it, upon which she brought him the missive-letter from Mr. Henderson now produced in process; but the deponent desired her to get an obligation from Mr. Henderson for the amount, signed before witnesses: She accordingly called on him, and shewed him the obligation now produced in process. This he thought happened a day or two before the deponent was apprehended by order of the magistrates; which to the best of his recollection, was upon the 4th day of May last. It was about ten o'clock at night when she called and shewed him the obligation.

Alexander Nicolson, tailor in Edinburgh, being specially interrogated, Whether Mrs. Macleod at any time promised him any thing to be a witness in this cause, deposed, That, about eight days after he was examined before the magistrates, the deponent having occasion to be in the tolbooth of Edinburgh, Mrs. Macleod whispered to him, that it should be better than £4 Sterling to him, if he would depose that he had carried a message from Mrs. Macleod to Mr. Henderson to come to her; that he came accordingly, and the deponent saw him deliver to Mrs. Macleod *an accepted bill by the Duchess of Gordon*: but the deponent answered, 'his conscience would not allow him to declare any such thing.' Deposed, That he afterwards 'got a letter from Mrs. Macleod, 'threatening him, that, in case he should declare 'any thing contrary to what he said before the magistrates, the King's Advocate would put him in 'prison; and that he did show said letter to seve-

‘ rals, and *particularly to Mr. Henderson’s doer (a- 1726*  
‘ *gent), Mr. Donaldson, and that the deponent had* ~~~~~  
‘ *since lost said letter out of his pocket.*’ Deposed,  
That, in February last, when he was working in  
Mrs. Macleod’s house, he heard her railing upon a  
maid servant ‘ for want of some money, and that a  
‘ man came into the room whom the deponent did  
‘ not know, nor remember any thing of; and that,  
‘ when the said man was gone, Mrs. Macleod came  
‘ to him, and said she had got a bill from said man,  
‘ but named no person; and said, it would be good  
‘ money to her. And Mr. Henderson at the bar be-  
‘ ing pointed (out) to the deponent, and asked if it  
‘ was the man that was in Mrs. Macleod’s house the  
‘ time deponed upon? deponed, He had not seen said  
‘ man (now) pointed (out) to him, in Mrs. Macleod’s  
‘ house, either that or any other time.’ Deposed,  
He thought the man who came into Mrs. Macleod’s  
had on a dark coloured wig.


Captain Neil Macleod deposed, That he had a ser-  
vant, one David Household, a lad about seventeen  
years of age, who left his service at Martinmas last,  
and whom he has frequently seen write. The mis-  
sive letter from Henderson to Petrie, and the obli-  
gation by Henderson to Mrs. Macleod being shown  
to him, deposed, ‘ That he could not say any thing  
‘ to the missive letter; but, as to the other obli-  
‘ gation, deponed, That, to the best of his knowledge,  
‘ it was the hand-writing of the said David House-  
‘ hold.’ Deposed, That Household was not of a  
slender make; that he wore his own black hair, and  
was about the head lower than Mr. Henderson; but  
he has seen him since wearing a *light coloured wig.*

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1726 ~ Robert Davidson, tutor to the Laird of Renton's children, deposed, That, upon the 3d of May last, to the best of the deponent's knowledge, he went to Mr. George Henderson's house a little after seven at night, and staid there till about eleven o'clock, and, during all that time, Mr. Henderson, the deponent, Mr. Home, and Mr. Kerr, were in company together, except that Mr. Henderson went occasionally out of the room; and the deponent thinks he was not absent above a quarter of an hour at a time.

William Kerr, teacher of French, deposed, That, on the 3d of May last, he was in Mr. Henderson's house from eight till ten at night, in company with Mr. Davidson, Mr. Home, and Mr. Henderson.—The latter went once out of the room; but the deponent is uncertain whether he went out a second time, and he was not absent above a quarter of an hour at a time.—They drank three bottles of liquor; Henderson brought in two of them, perhaps all the three.

Alexander Home, writer in Edinburgh, deposed, That, on the 3d of May last, he was in Mr. Henderson's house, in company with Mr. Davidson and Mr. Kerr. The deponent staid there from about eight, till about eleven at night. Mr. Henderson was coming and going to and from the room during this whole time; and the deponent did not think that Mr. Henderson was absent above a quarter of an hour at any one time.—This witness, and the two preceding ones, assigned as their cause for remembering, that it was on the 3d of May last that they were in Mr. Henderson's house, that he, Kerr, and Davidson, had a previous appointment to meet

there, in order to his going to learn French with 1726  
Mr. Kerr. 

Patrick Innes, writer in Edinburgh, deposed, That Mrs. Macleod having shown the deponent the obligation subscribed by Mr. Henderson, and produced in process, told him, that the motive of Mr. Henderson indorsing the Duchess of Gordon's bill to her was, that he might conceal an unlawful correspondence which he kept with one Helen Moody, a servant of hers, and carry the said Helen out of the country. Mrs. Macleod told the deponent this in the house of John Gibson, on the 4th or 5th of May. Being interrogated, If he knew that Mrs. Macleod did keep out of the way on account of this bill? deposed, That Mrs. Macleod absconded for three days, and told the deponent, that the reason of her doing so was, 'That Petrie had a warrant to apprehend her, and *that she expected payment against eight o'clock at night, on Saturday, from Mr. Henderson; and that then she would give them all the tail of a long tow\*.*'

—The deponent went along with Mrs. Macleod to one Doctor Smith, who was well acquainted with the Duchess of Gordon, and requested him to intercede with her Grace, that she would pass from any ground she had for challenging the bill; but this 'the Doctor positively refused; upon which Mrs. Macleod *said she was undone.*'

Mary M'Aulay, widow of Alexander M'Lellan, barber in Leith, deposed, That some few days after Mrs. Macleod was made prisoner, the deponent saw in her house one David Household, who told her, that, a

\* The swing of a rope.

1726 few days before Mrs. Macleod was apprehended, he, at her desire, did put on a coat of her husband's, and went along with her to the Canongate; and in some house there, did assume the name of Henderson, and under that name did subscribe a paper, in presence of two witnesses, one of them a married man, and the other a young lad: And he said it was on account of this paper that Mrs. Macleod was put in prison. He added, that the reason she gave for his putting on her husband's coat was, that he might appear like Henderson.—Household expressed his sorrow for what he had done; said he was not aware of his hazard; but now he was in danger of his life, and was resolved to fly the country: that he was afraid to cross at Leith, lest he should be apprehended, and would cross at Queensferry.—And the deponent believed that he fled accordingly.

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Thus far had the trial proceeded, neither party being able to produce more witnesses to support their mutual recrimination and defence, when the Lord Advocate, on the last day but one of the *Summer Session*\*, represented to the Court, that, as the evidence given must have established with their Lordships a conviction of Mr. Henderson's guilt, the duty of his office required it of him, to ask their Lordships to pronounce a decree, finding the bill drawn upon the Duchess of Gordon to be forged

\* The terms of the Courts of Justice in Scotland, are called *Sessions*. There are two of them in the year, the *Summer and the Winter Sessions*.

by the prisoner Henderson; and therefore remitting 1726 him to the Court of Justiciary, that he might suffer a capital punishment.

The counsel for Mr. Henderson urged\* in his defence, that notwithstanding the direct testimony which was given by several witnesses, of his having granted the obligation relative to the forged bill; yet, having visited him in prison, and repeatedly examined him in private, in the most solemn manner, the simplicity, uniformity, and steadiness of his answers to the counsel's interrogatories, gave the latter, if not a perfect conviction, at least a strong belief, that Henderson was truly innocent.—The counsel therefore requested of their Lordships, that they would not be hasty to embrace, nor resolute to conclude, a decided opinion of Henderson's guilt; for that even procrastination was not a fault, when the life of a man was at stake. And he entreated their Lordships to spare his feelings of the pain it would give them, to see a sentence pronounced on almost the last day of a *Session*, which was to be the foundation of a capital punishment being adjudged to a man, of whose innocence he still entertained a strong persuasion.—The solemn and animated address of the counsel made a forcible impression upon the

\* Mr. Dundas of Arniston, afterwards Lord President of the Court of Session; the same who is mentioned above in the trial of Carnegie of Finhaven.—The circumstances of this trial which do not appear upon record, were communicated to me by his son the Lord President, of whose faithful memory I have more than once had occasion to see the most unequivocal proof. He learned those circumstances in repeated conversations with his father, and the Lord President Forbes.

1726 Court, and their Lordships delayed the cause till the  
~ Winter Session.

During the vacation, a singular coincidence of circumstances occurred, which was the means of vindicating Henderson's innocence, and of detecting a profound scheme of fraud, no less ingeniously contrived, than dexterously executed: and this discovery, his Majesty's Advocate and Solicitor General, in their pleadings before the Court, publicly attributed to Providence.

The Lord Advocate, when going North to his house of Culloden, paid a visit to Mr. Rose of Kilravock.—Mr. Rose showed his Lordship a house he was building; and, happening to miss one of the carpenters whom he thought an expert workman, he asked the overseer, What was become of him? The overseer taking Mr. Rose aside, bid him take no further notice of this; for the young man, upon hearing that the Lord Advocate was to be at Kilravock, declared it was high time for him to leave the country; and that he would immediately go to Aberdeen, and take shipping for London.—This Mr. Rose communicated to his Lordship, who asked the overseer the carpenter's name, and, if he knew of any crime that the carpenter had committed? The overseer answered, *that the man's name was David Household, and he suspected the crime was being accessory to some forgery.* The Lord Advocate immediately despatched a messenger to Aberdeen, who apprehended Household, and carried him prisoner to Edinburgh.

Upon the commencement of the Winter Session, Household being brought before their Lordships, and examined, deposed, That in the beginning of



the year, he at the desire of Mrs. Macleod, wrote the bill produced in process,\* which she dictated to him; and he in particular, did write the name of George Henderson, both as drawer and indorser; but the word 'Gordon,' he did not write. At another time Mrs. Macleod carried him to a gardener's house without the Water-gate, at the foot of the Canongate; but, before taking him there, she put on him a coat belonging to her husband, and a black knotted periwig, and told him, that she was to bring him into the company of two honest men, before whom he must personate George Henderson. The deponent did as she desired; and, in the gardener's house at the Water-gate, she dictated to him a part of the obligation produced in process.—Thereafter, she took him to a wright's house in the Canongate, on the south side of the street, a little below the Earl of Moray's, and there, in presence of the wright, and of a boy called Dempster, Mrs. Macleod dictated, and the deponent wrote the remaining part of the obligation, and subscribed it with the name of George Henderson, in presence of the wright, and of Dempster, who subscribed as witnesses. The letter produced in process from George Henderson to William Petrie, being likewise shown to the deponent, he deposed, That he wrote it also at the desire of Mrs. Macleod, who dictated the same to him; and this happened before he wrote

\* The Lord Advocate has often been heard to say, That had his rash desire been complied with, and Henderson executed, and his Lordship had learned the facts which afterwards appeared, he should have looked upon himself as guilty of murder.

1726 the obligation mentioned above. Deposed, That, after Mrs. Macleod was put in prison, a Highlandman came to him, and said, that he was sent by Mr. Macleod, Mrs. Macleod's husband, to persuade him to abscond on account of those papers he had written, This he thought unnecessary, as he wrote them at the desire of another, and was '*altogether ignorant of the import of said writings,*' But upon advising with some friends, he was convinced of his danger, and he absconded and fled.

John Winchester, clerk to the comptroller of the customs at Leith, deposed, That he was intimately acquainted with David Household: that some time in May last, the deponent went to see Household, who was then working aboard Captain Marsham's ship, which was lying in Leith harbour; but was told that Household was not to be found. He called a second time, and the mate of the ship brought Household to him. The deponent asked, What was the matter with him? He answered, That he was obliged to hide himself; for Mrs. Macleod had induced him one day to go to a house in the Canongate with her, and there to write out a bill for her for about £50, or £60, in presence of two witnesses; but the deponent does not remember what he said about subscribing the bill. Deposed, That he said to Household, "He would be hanged for so doing;" to which Household answered, He was resolved to fly; and added, that he had got a message from Mrs. Macleod's husband to abscond. The deponent asked him, If it was on account of this bill that Mrs. Macleod was put in prison? 'To which he answered, 'That it was the very same.'—The bill, letter, and

obligation in process, being shown to the deponent, 1726  
deposed, That he was well acquainted with Household's hand-writing; and he believed the said deeds to be written by him.

Archibald Dempster, a preceding witness, being re-examined, and his former deposition read over to him, deposed, That nobody instructed him as to what he was to say in that deposition, nor promised him any reward on that account.—*Being confronted with Henderson\* at the bar, and with David Household, being desired to look narrowly upon the said David, and upon George Henderson at the bar, in order to declare upon oath which of the said two was the person who wrote and subscribed the obligation in the house of John Gibson, mentioned by the deponent in his former oath, deponed, That he did believe that the said person was said David Household, and not George Henderson.*

The second part of this profound plot being performed, and the 'plot detected,' it remained now but for public justice to bring the matter to a catastrophe.—Upon the eighth of December, the Lord Advocate represented to the Court, that it was manifest that the Duchess of Gordon's bill was a forgery: That it was evident from the proof that Henderson was innocent of the forgery, who therefore ought to be acquitted; and that Mrs. Macleod was guilty,

\* The Lord Advocate made the great black knotted wig be taken off Henderson and put upon Household, to refresh his perceptive as well as recollective faculties. He also made Household take a pen and write Henderson's name before them, to establish, *ex comparatione litterarum*, whose hand-writing the deeds really were.

1726 *art and part*, of the same, as well as of counterfeit-  
 ing the letter and obligation produced in process.  
 This, his Lordship said, was established by Household, who, at the desire and by the contrivance of Mrs. Macleod, actually forged the deeds;—by Dempster, who, in his second deposition, ingenuously and satisfactorily accounted for the mistake into which he was led in his first, by the artful contrivance of Mrs. Macleod;—by comparing the deeds produced with the hand-writing of Household taken down in their presence;—and by the evidence which Henderson had led of an *alibi*. He added, that she had formed a malicious intention to hang her neighbour, and it was but just she should fall into her own snare.—Upon the whole, his Lordship observed, that, by her artful and horrid contrivance, Mrs. Macleod had well nigh made ‘an innocent man suffer death. ‘That this contrivance was, by the good providence ‘of God, discovered: and concluded, that therefore, ‘the said Mrs. Macleod was guilty, *art and part*, of ‘forgery, and ought to suffer the pains of death.’ The Solicitor General\* added, ‘that there was such ‘a horrid design, and so artfully laid, *that, at first, ‘he did firmly believe Henderson guilty, nay, and could ‘appeal to all, if by good providence, Household had ‘not been apprehended, they had not condemned Henderson.*’

The defences which Mrs. Macleod’s counsel † urged in her behalf respected the nature of the crime

\* Mr. Charles Erskine, afterwards Lord Justice Clerk.

† Mr. Robert Craigie, afterwards Lord President of the Court of Session.

and the evidence of her guilt. The nature of her 1726 crime, it was alledged, was not an intent to defraud the Duchess of Gordon of any money; neither, in fact, was her Grace, or any other person, defrauded. The sole purpose was to use the deed as a fund of credit for raising a pittance of money, which she applied to the most pious of purposes, the relieving her husband from a prison. And, as to the subsequent part of her alledged conduct after it came to be discovered that the bill was forged; whatever might be the *result*, the *intention* was not *malice* against Henderson, but a desire to save her own life, and therefore was a species of self-defence, which greatly alleviated her supposed guilt, according to the brocard, '*licet unicuique sanguinem suum redi- mere qualiter qualiter.*' The evidence of her guilt, again, was the testimony of but one witness, which, although it might be entitled to some credit in a civil cause, could be no ground for proceeding upon in a matter of life and death. And how far this witness was deserving of any credit with their Lordships, let his public infamy, of which he himself stood recorder, determine; for he had placed himself in so singular and unequivocal a point of guilt, that, whether his testimony was true or false, it branded him with equal infamy. Neither was Dempster's evidence to be regarded, as his first and his second depositions were repugnant to each other. As for the argument of Henderson's *alibi*, which was now had recourse to, it had grown the better for the keeping; for at the end of the Summer Session, it surely had no weight with the Lord Advocate, when, notwithstanding of it, his Lord-

1726 ship moved, that *Decreet of Reduction and Improbation* should be pronounced, and Henderson as the guilty person, remitted to the Court of Justiciary. Farther, the witnesses who deposed to what is pleaded on as an *alibi*, admit that Henderson was frequently out of the room, and that perhaps, for a quarter of an hour together; and how natural it was for comrades over a bottle to think *a whole hour but a quarter*, would readily be admitted. Upon the whole, as the testimony of such a person as Household was so little worthy of making faith in judgment; and as there was no precise punishment by our law annexed to the crime of forgery, but it remained with their Lordships to adapt the extent of penalty to the degree of guilt, he hoped they would either acquit Mrs. Macleod, or at farthest subject her to an arbitrary punishment.

The Court found that Mrs. Macleod was 'guilty, *art and part*, of the said forgeries.' They reduced the deeds, remitted Mrs. Macleod to the Court of Justiciary, acquitted Mr. Henderson, and dismissed him from the bar.

Mrs. Macleod was then served with a criminal indictment at the instance of his Majesty's Advocate, setting forth, that, by the law and practice of this kingdom, the crime of forgery, or the being *art and part* thereof, or the using of forged deeds, was punishable with 'death, and confiscation of moveables, 'and other pains of law:' that nevertheless, Mrs. Macleod had been guilty of all, or one, or other, of these crimes, in so far as she had forged a bill upon the Duchess of Gordon, &c. &c. That the Court of Session had pronounced a sentence, declaring the

bill, &c. to be forgeries, and that the prisoner was <sup>1726</sup> *guilty, art and part*, of the same, and therefore remitting her to the Court of Justiciary: and that the extracted, *i. e.* authenticated, decree of the Court of Session, was lodged with the clerk of the Court of Justiciary. ‘All which, or any part thereof, being ‘found proven against her,’ she ought to be punished with the pains of death.

The prisoner and the public prosecutor were heard by counsel. It was objected for her, that forgery, by the law of Scotland, did not infer a capital punishment: that she was not accused of having actually committed the forgery, but only of being *art and part*: that she had not used the bill with an intent to defraud, but merely as a fund of credit for a small sum of money, which she meant honestly to repay; and that the decree of the Court of Session was neither to be held as determining the relevancy of the indictment, nor as *probatio probata*, or evidence not to be controverted of the prisoner’s guilt. Informations for both parties were also lodged by order of the Court. But as the defences stated for the prisoner were over-ruled; and as these general points of law, and of form, are now established by the subsequent practice of more than half a century, it is needless for me to state the arguments which they contained.

The Lords pronounced an interlocutor, repelling the defences stated for the prisoner, and finding her being guilty of forging any of those deeds, or that ‘she was art and part thereof, relevant to infer the ‘pains of death.’ The Solicitor General then produced the ‘Decreet of Improbation obtained before

1726 ' the Lords of Session, and craved that the same  
~ ' might be read openly,' which was done accordingly. The decree being read, the Court ordered the assize instantly to inclose. The jury returned a verdict, unanimously finding the indictment proved, and the prisoner ' guilty, art and part, of the crimes libelled.' The Court adjudged the prisoner to be hanged on the eighth of March.

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If Mrs. Macleod showed art in the contrivance, and dexterity in the execution of this fraud, she displayed no less fortitude in undergoing the punishment, which resulted from a perverted application of so much ingenuity. She went to the place of execution dressed in a black robe and petticoat, with a large hoop, a white fan in her hand, and a white sarsenet hood on her head, according to the fashion of the times. When she came upon the scaffold, she put off the ornamental parts of her attire, pinned a handkerchief over her breast, and put the fatal cord about her neck with her own hands. She persisted to the last moment in the denial of her guilt, and died with the greatest intrepidity.



## OF BREAKING OF GARDENS.

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*John Rait and Alexander Dean for Breaking of  
Gardens.*

THE prisoners were indicted at the instance of his 1623 Majesty's Advocate for breaking into the gardens of Barnton,\* Pilton, Barnbogle, Greycrook, Craigiehall, and Carlowry, and stealing thence herbs, artichock plants, *sybows*, i. e. young onions, and beehives. They had formerly been convicted before an inferior judicature, for breaking gardens in the neighbourhood of Musselburgh; and by warrant of the Privy Council, which was produced in Court, they were sentenced to be taken to the Burrow-Muir of Edinburgh, and there hanged.

\* Records of Justiciary, July 11, 1625.

## OF INCEST.

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*Alexander Blair, Tailor in Currie.*

1630 *w* ALEXANDER BLAIR, tailor in Currie, was criminal-ly prosecuted by his Majesty's Advocate for incest.\* The fact charged against him was, that he had carnal knowledge of one Catherine Windrahame, his first wife's half brother's daughter. And being admonished by the kirk to abstain from this connection, instead of yielding obedience, he fled to England with the woman, and there married her. The jury unanimously found him guilty, and the Court ordained him to be beheaded.

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*James Wilson, Coal-grieve at Bonhard.*

1649 *w* THE prisoner was tried before Mr. Alexander Colvil Justice-depute, at the instance of Mr. Thomas Nicolson, his Majesty's Advocate. The indictment accused him of having committed incest with Jane

\* Records of Justiciary, September 9, 1630.

Carse, daughter of Agnes Brown, his wife,† *about* 1649 *thirty-five years since, or thereabout*, his wife being then alive; also of having committed adultery with Jean Walker during the lifetime of his said wife.

The prisoner with great penitence confessed his guilt before the Court and jury; and a verdict being returned against him, the Court ordained him to be taken on the next day to the Castle hill and beheaded, and his personal estate to be forfeited.

*William Drysdale and Barbara Tannahill.*

WILLIAM DRYSDALE and Barbara Tannahill were 1705 served with separate indictments, accusing them of having committed incest with each other. The crime libelled was, that the prisoner, William Drysdale, a widower, (whose wife, a sister of the other prisoner, had been dead for two years) had layen with the said prisoner, Barbara Tannahill:\* and that, by an act passed in the reign of King James VI. parl. 1. chap. 14. and by the 18th chapter of Leviticus, this crime inferred the pain of death.—The charge against Barbara Tannahill was the same, *mutatis mutandis*.

Informations, neither ingenious nor elaborate,

† Records of Justiciary, December 20, 1649.

\* Records of Justiciary, 8, 22, January, March, 12, June 12. 1705.

1705 were lodged for and against the prisoner, Drysdale.  
The Court repelled the defences and found the libel relevant.

### THE PROOF.

Barbara Tannahill judicially confessed that she had layen one time only with the other prisoner, Drysdale, and that she was now with child by him.

Mr. Samuel Semple, minister at Liberton, deposed, That Barbara Tannahill *confessed her guilt before him and the kirk session*; and that he interrogated the other prisoner Drysdale, who expressly disavowed the charge.

Robert Hardie deposed, That one evening going by the house where the prisoners lived, he heard Barbara Tannahill's voice calling out, once and again, 'O deam' and did hear the other prisoner using expressions of entreaty, or rather of violence, towards her. And that the prisoners lived in a house by themselves. —Two other witnesses swore to Tannahill's confession, and Drysdale's denial, of guilt: that Drysdale's wife had been dead for two years; and that the prisoner Tannahill was her sister.

The jury found the indictment proved against Tannahill, but found nothing proved against Drysdale but the woman's 'judicial confession, which is 'a great presumption of his guilt.'—The court adjudged Tannahill to be hanged, and Drysdale to be banished for life.

Even according to the Mosaic law these unfortunate persons could not have been legally convicted, and the Scottish statutes\* declares the Mosaic law, as laid down in the 18th chapter of Leviticus, to be the rule for determining incest. In the information for his Majesty's Advocate against the prisoner Drysdale, an unwarrantable and absurd extension of this crime was attempted.—That as it is there commanded, Thou shalt not lie with *thy brother's wife*, so from the degrees of affinity being the same, the command must likewise be *understood* to be, Thou shalt not lie with *thy wife's sister*. To this it may be answered.—1mo, That to suppose a penal law reaching life not to be *expressed* but *implied*, is to deem us to be governed not by law but by despotism. 2do, To lie with a brother's wife occasions an uncertainty as to the progeny. 3tio, To do so is not only incest but adultery. 4to, It is not commanded—Thou shalt not lie with thy brother's *widow*. 5to, This connection by affinity is dissolved and the survivor is loosed by the death either of husband or wife. 6to, This argument is completely illustrated by the command in a subsequent verse of the same chapter,—Thou shalt not *veal* thy wife† by lying with her sister in her.....*lifetime*. 7mo, To marry a brother's widow was an express injunction of the law of Moses; and if the surviving brother declined the match, the widow was entitled by that

\* James VI. parl. 1. c. 14.

† The words are still more distinct and forcible in the *vulgate* or St. Jerome's translation, than in the English edition of the Bible. 'Sororem uxoris tuæ in pellicatum illius non accipies,

1705 elegant and dignified system of jurisprudence to—  
 ~~~~~ *spit in his face.*\*—These arguments however were  
 either omitted or over-ruled.

A rancorous detestation of irregular commerce between the sexes, has distinguished those religious sects which pretend to an uncommon degree of spiritual purity, and in a peculiar manner the rigid disciples of Calvin. Indeed, the Apostlet to whose mysterious doctrines they are peculiarly attached, has barely tolerated the giving obedience to that impulse, with which nature has directed every animal to the propagation of its species.

The instructive page of history, and the fatal warnings recorded in criminal courts, sufficiently evince what public mischief, what private conflict, what dark and atrocious crimes have proceeded from a mistaken notion of religion, inculcating a perpetual warfare with the dictates of nature.

The preservation of morals, by debarring a union between persons whose frequent opportunities pave the way to debauchery.—The preventing a perplexity in the degrees of kindred.—Perhaps also, the preserving a strong and healthy breed, have induced civilized nations to prohibit as incestuous, commerce between persons nearly connected by *consanguinity*. It does not appear that the same reasons apply to the debarring such union between those who are connected by *affinity*.—After the husband

‘nec revalebis turpitudinem ejus, *adhuc illa vivente.*’ Biblia Parisiis ex officina Stephani e regione Scholae Decretorum, MDXX. Leviticus, c. 18. Here the words truly express the sense ‘*in pellicatum illius,*’ being adultery against her.

* Deuteronomy, c. 25. v. 9.

† 1st Corinthians, c. 7.

is dead, the wife surely is not guilty of adultery by 1705 entering into a second marriage; for, ‘*if the husband be dead,* she is loosen’d from the law of her husband.*’ If so, I do not perceive how the connection thus dissolved by death, can imply against the survivor, the crime of *incest*, any more than that of *adultery*.

A more rigid degree of Calvinism than what now prevails was established in the reign of William. The judicatories of the church possessed a jurisdiction. The slightest informalities between the sexes excited zealous abhorrence. To avoid the disgrace of the *repenting-stool*, many a miserable wretch dared a guilt which was to be expiated by the pain and ignominy of the *gallows*. The Presbyterian† clergy, in matters of scandal and of witchcraft, arrogated to themselves the office of public prosecutors, of inquisitors general; and so late as the year 1720, the ministers, *in behalf of themselves and their kirk-sessions*, publicly exercised this office in our courts of justice. Their busy zeal in hunting out after young women whom they suspected of being with child, and after old women who lay under the imputation of witchcraft, was productive of the most dismal consequences. In the one case, the persecution was directed at unhappy women who *had obeyed the im-*

* Romans. c. 7. v. 2.

† Original precognition taken before the sheriff-depute of Ross, June 23d, 1720, against Helen Bowie and Janet Thomson for witchcraft, at the instance of ‘Mr. David Ross, minister of the gospel at Tarbatt, *in behalf of the session of the said parish,*’ in possession of the Right Honourable Robert Dundas of Arncliffe, Lord President of the Court of Session.

1705 *pulse of nature*; in the other, at those who incurred the imputation of doing what *nature rendered it impossible for them to do*. In both, the pains and the piety of the clergy were productive of the same issue, the driving miserable creatures to the gallows.— And the recorded convictions before the Court of Justiciary at Edinburgh, of *twenty-one women for child-murder*, and three men *pro venere nefanda cum brutis animalibus*, in the space of seven years,* afford a melancholy proof that the insulted dictates of nature, when checked in their regular course, will burst forth in a torrent that will sweep away every feeling of humanity, and every sentiment of virtue.

* From A. D. 1700 to 1706, inclusive.—See Rec. of Just.

OF ADULTERY.

John Guthrie for notour, i. e. notorious Adultery.

ADULTERY was first made capital in Scotland by 1617 act of Parl. 1563. chap. 74. The thunder of the law in the statute immediately preceding, had been hurled against witchcraft; and an act passed in the present century, 'ratifies and revives all former laws and acts against drunkenness, Sabbath-breaking. swearing, fornication, adultery, and all manner of uncleanness;' and it specially and expressly revives* the act above mentioned against adultery. Notorious, or *notour* adultery, is, 1^{mo}, When children are procreated between adulterers; 2^{do}, When they are publicly known to sleep with each other; or, 3^{tio}, When being suspected of adultery, and admonished by the Kirk to refrain from the vice, and to do penance for the scandal; yet refusing obedience, they are excommunicated for the same. James VI. Parl. 7. chap. 105.

John Guthrie was prosecuted for the crime of notorious adultery. He was accused of having married a wife in the shire of Forfar, and deserted her;† of having afterwards come to Leith; of having laid

* William, Parl. 1. Sess. 8. c. 11. *It is a fortunate maxim in our jurisprudence, that statute law prescribes.*

† Rec. of Just. 14th March, 16th April, 1617.

1617 aside the name of Laird, which he bore in Forfar, and assumed that of Guthrie, and there marrying another wife, with whom he cohabited for several years; and also, of committing adultery with another woman. *These facts he acknowledged before the Kirk-session* of Kirkliston, and did penance in sackcloth for his impurities.—Being thus detected and stigmatized by the church, the secular arm was next stretched forth against him. A warrant under the royal sign manual, dated at Whitehall, 26th of January, 1617, was directed to the Lord Justice General, and the other Justices. It set forth, that the King's Advocate, by his Majesty's express command, was about to prosecute the prisoner for the crime of notorious adultery, and required the Justices instantly, on his conviction, to condemn him to death. The Court had the humanity not to enter this warrant upon record till about a month after the prisoner's conviction, when it sentenced him to be taken to the Cross of Edinburgh, and hanged on a gibbet till he be dead; and he appears to have been carried to immediate execution.

Two other persons, Alexander Thomson and Janet Cuthbert, were also, by royal warrant, tried for adultery on the same day with the prisoner, and were convicted. But the King was pleased to direct, that out of his *princely clemency*, they should not be put to death, but banished.

Patrick Robertson and Marion Kempt, for Adultery.

THE prisoners were accused of adulterous commerce with each other; the fruits of which were, Marion Kempt's bearing three children to the said Patrick.* They were also charged with the said Marion's having, with Patrick's knowledge and consent, taken poisonous drugs, by which her first child was killed in the womb. They were convicted on their own confession; and, on the 20th of the same month, were sentenced to be hanged on a gibbet at the Castle-hill.

John Fraser, Writer in Edinburgh, for Adultery.

Counsel for the Prosecutor,
Sir George Mackenzie.

Counsel for the Prisoner, Sir
George Lockhart, &c.

THE prisoner was tried capitally for the crime of adultery, at the instance of his wife, and of Sir John Nisbet of Dirleton, his Majesty's Advocate. The fact libelled against him was simply, that, in absence of the private prosecutor, he had married another woman.

The prisoner's counsel urged in his behalf, that although the private prosecutor had a right of action to annul the second marriage, and to compel the adherence of the prisoner;† yet she had no title to prosecute him criminally, *ad vindictam publicam*, in a suit, in which if she prevailed, the husband whom

* Records of Justiciary, 18th, 20th, December, 1627.

† Rec. of Just. 17th Nov. 1673, 12th Jan. 20th July, 1674.

1673 she claimed must be bereft of his life. That if any irregularity, or offence, has been committed by the prisoner, it was owing allennarly to the snares laid for him by his wife, the insidiousness of whose malice could only be paralleled by the effrontery of her prostitution. The prosecutor having been equally public and promiscuous in her debaucheries, the prisoner had several years before been obliged to sue, before the Commissaries of Edinburgh, for a divorce from her; but, conscious of guilt and infamy, she had embarked on board a ship destined to carry felons to Virginia, and the prosecution was suffered to drop. After having been absent for a considerable time, a report of her death was circulated and believed, and what was at first a *rumour*, became afterwards *evidence*; the shipmaster, one of the seamen, and a passenger on board the ship in which the prosecutor embarked, having given a testificate on oath, of her having died in Virginia. This testificate was laid before the Presbytery of Edinburgh; and the clerk of the Kirk-session was ordered to examine into the same. Having done so, he was satisfied by the granters, that the certificate was true, as well as authentic. This report being laid before the Presbytery, they authorised the proclamation of banns, which was regularly performed; yet no interruption was made to, no question brought of the marriage, for upwards of four years. And, at the end of this period, the prosecutor starts up as from the dead, with a halter in her hand, menacing the prisoner.

It now appears that she had lurked for great part of that time in Aberdeen, Dundee, &c. under the name of Mrs. Gerard; *that she had circulated the*

report of her own death: that, since her assumption ¹⁶⁷³ of a feigned name, her life had been as profligate as before her embarking for Virginia. And that she had brought forth three adulterous children, the unequivocal testimony of her shame and guilt; one of them not six months preceding this very trial, which she has brought in order to get her husband hanged on a charge of adultery. It was argued, that the prosecutor's *infidelity* to the marriage vows had given occasion to the suit for a divorce, which the prisoner had brought against her before the Commissaries; and authorised the process of recrimination before this Court, which the prisoner was immediately to institute: *that this infidelity* would exclude the civil effects of a divorce, and much more ought to debar his wife from prosecuting the husband capitally for the very offence she had committed against him.— That she had laid a snare for him, by propagating rumours of her own death, and by lurking under a feigned name. Besides these defences, it was argued for the prisoner, that adultery could not be committed without consciousness, ‘*nam voluntas et propositum distinguant maleficia.*’ And the probable rumour, nay the direct certificate of the prosecutor's death, exempts from the suspicion of consciousness, and consequently from the crime of adultery, according to the case in the civil law, ‘*Mulier cum audisset absentem virum defunctum* esse, alij se junxit, et falsis rumoribus inducta, et quia verisimile est eam deceptam fuisse, nihil vindicta dignam vi-deri potest.*’

It was answered for the prosecutor, That *he* is an

* Digest. L. 11. § 12. de adulteriis.

1673 adulterer who lies with another woman while his wife lives; and, as rumour could not dissolve marriage, so neither could it defend against adultery; otherwise it were easy for any man who grew weary of his wife, to propagate reports of her death, and then to take advantage of the rumours he himself had fabricated. That even, if rumours were sufficient, yet these ought to be constant and universal; whereas, in this case, there was but one certificate, and it bore only, that *Margaret Hailly* died in Virginia, not that *Margaret Hailly, wife of John Fraser*, died in Virginia: that it was not *probable*, but *invin-*
cible ignorance alone which could be excusable: that the prisoner had not made sufficient inquiry concerning his wife at her relations, and his ignorance was affected: that a long lapse of time must intervene; whereas here, there was but an absence of three years: that the prisoner ought to have executed a summons of adherence against his wife, which would have entitled him to a divorce: that the Presbytery of Edinburgh had not a jurisdiction competent to the dissolution of marriage; consequently their warrant was altogether insignificant.

To this sophisticated reasoning the Court gave the sanction of its judgement, repelling the argument urged in behalf of the prisoner.

Nothing now remained but to lead a proof of the fact. The proof amounted solely to the prisoner's having married Helen Guthrie his second wife, and lived under the same roof with her as married persons. Even the consummation of the marriage is not proved, but is only matter of presumption. The jury by plurality of voices, viz. *nine to six*, found the prisoner guilty.

Margaret Haitly, for Adultery.

1673

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IT was now Mrs. Haitly's turn to stand trial for her life. On the same day with her husband she was prosecuted at his instance, and that of the Lord Advocate, on a charge of adultery with ten different persons specified in the indictment; and of having born three children, the fruit of her unlawful amours, the last of them not six months preceding.

The evidence of her criminal correspondence, and of the bearing three children in adultery, was complete; yet the jury, from what reason or motive I cannot conjecture, were not unanimous, but by a plurality of *eleven to four* found the prisoner guilty. It was not however '*the feet of them which buried her husband that carried her out.*'

The Court delayed from time to time pronouncing sentence upon the prisoners. On the 20th of July after, John Fraser was set at liberty, in consequence of having obtained his Majesty's pardon. The other convict Haitly still remained a prisoner; but after a minute and painful examination of the records, I have not been able to discover whether she was kept prisoner for life, or what became of her.

*John Murdoch and Janet Douglas, for Adultery.*

JOHN MURDOCH and Janet Douglas, both of them 1699 married persons, inhabitants of Edinburgh, were tried capitally at the instance of his Majesty's Advocate, not for *notour*,\* but for simple adultery, *i. e.* for

\* Records of Justiciary, September 14, November 6, 1699.

1699 one act of adultery. Informations were lodged for the prosecutor and the prisoners. The King's Advocate restricted the libel to an arbitrary punishment. The prisoners threw themselves upon the King's will, and were banished for life, never to return under pain of death.

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If the frequency, variety, and severity, of criminal prosecutions, can establish the purity of statesmen and judges, this surely was an age in which persons in public office could boast of a very uncommon degree of purity and virtue. In this case, such was the zealous detestation of vice, that persons were indicted capitally for simple adultery, although neither by the statutory law, nor the judgements of the criminal courts, was simple adultery ever deemed capital. A few months preceding this trial, the Court of Justiciary entered on its journal† a recommendation to the King's Advocate, to prosecute witches. About the close of that century too, a man was hanged for murder, although the jury found that the prisoner in defending himself had killed the deceased. Another was hanged for expressing in conversation, opinions on religion and philosophy opposite to those of the times. A third was tried for high treason, for engraving a political print, but acquitted by the jury. Others suffered death also, when perhaps their trials had better been omitted.

† Records of Justiciary, March 27, 1699; Nov. 21, 1695; Dec. 24, 1696; July 10, 1699; April 14, and 22; May 24, 1701; July 10, 1699.



## OF FORNICATION.

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*Christopher Little and Margaret Jameson, for Fornication and Theft, charged against them in one Indictment.*

AFTER the abolition of Popery, and establishment of the Confession of Faith by authority of Parliament, <sup>1653</sup> one of the first acts of the legislature was to annex a punishment to '*the filthy vice of fornication.*' The punishment was, for the first offence, to pay a fine of £40 Scots, (and upon failure of payment† to undergo eight days imprisonment, and to be fed upon bread and water), and to stand two hours upon the pillory. For the second offence the fine was raised to 100 merks; and besides being put upon the pillory, the convict was to have *his or her* head shaved. And for the third offence the pecuniary mulct was augmented to £100 Scots, and the convict was ordained to be thrice ducked in the deepest and foulest pool in the parish, and then to be banished from the same for ever. And this zealous act has been renewed so late as A. D. 1696.

On the 16th of October, 1652, a commission was produced in the Parliament-house at Edinburgh,

† James VI. Parl. 1. chap. 13.; William, Parl. 1. sess. 6. chap. 31.


1653 from the Commissioners of the Parliament of the  
Commonwealth of England, and recorded in the  
books of Justiciary, appointing George Smith, John  
March, Andrew Owen, and Edward Mosley, Es-  
quires, or any two of them, commissioners for the  
administration of justice to the people of Scotland in  
causes criminal.

On the 21st of June, 1653, Henry Whallie, Ad-  
vocate-General,† prosecuted Jean Hamilton, Chris-  
topher Little, and Margaret Jameson, before the  
Honourable George Smith and Edward Mosley, two  
of those Commissioners. The prisoners were charged in the indictment with ‘being all three access-  
‘ry, art and part, of stealing shirts and sheets forth  
‘of the house of Elisabeth Potter, widow in New-  
‘haven, after the said Jean Hamilton, her theftuous  
‘upbreking thereof, committed on the 6th day of  
‘May last: and the said Christopher Little and Mar-  
‘garet Jameson for the crime of fornication commit-  
‘ted by them with each other.’

The prisoners, Little and Jameson, denied the  
theft, but acknowledged the fornication, and sub-  
mitted themselves to the mercy of the Court.

The jury, after hearing evidence, unanimously  
found the prisoners Hamilton and Jameson, guilty  
of stealing the sheets and shirts, and acquitted the  
prisoner Little of the same. They also unanimously  
found the prisoners Little and Jameson guilty of for-  
nication. The Court sentenced Jean Hamilton to be  
scourged for theft from the Castlehill to the Nether-  
bow, and then to be put into the Correction-house

† Records of Justiciary, October 16, 1652; June 24, 1653.

till farther orders; and ordained Little and Jameson 1653  
for fornication instantly to pay £40 Scots, and in   
case of refusal to be kept prisoners for eight days,  
and fed on bread and *small drink*, and next market  
day to stand an hour bare-headed on the pillory; the  
prisoner Little then to be set at liberty, but Jameson  
for the theft to be put in the Correction-house.

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## OF BLASPHEMY.

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*Thomas Aikenhead for denying the Trinity, and the authority of the Scriptures, and for maintaining the Eternity of the World.*

1696 { THE pious Charles II. being restored to the throne of his ancestors, he and his *upright*\* administration set themselves about the great works of religion and morality.

A Parliament worthy of such a King and such a ministry having accordingly, in contradiction to, and contempt of, the principles of a great body of the people, vested the King with a power of establishing any form of Church government he chose,† it proceeded next to enact statutes against Sabbath-breaking, swearing, drinking, and other profanities and immoralities. These pious laws being made, another immediately followed, annexing the pain of death to the railing against God, or any of the persons of the Trinity, or denying them, and obstinately persisting therein.

I have hitherto discovered but three prosecutions

\* See an instance of the *recorded perjuries* of the great officers of state to rob a man of his life; Arnot's History of Edinburgh, p. 149.

† Charles II. parl. 1. sess. 1. acts 16, 18, 19, 21.

for the crime of blasphemy. The first was that of a woman who was tried before the Circuit Court of Justiciary at Dumfries, A. D. 1671. But, as the records of the Circuit Courts previous to this century are lost, all I can say of the matter is, that the act \* of blasphemy charged against the prisoner was her drinking the Devil's health, that the Court did not find it relevant to infer the crime of blasphemy, but fined the woman in the sum of 500 merks for the offence. The second prosecution was against Francis Borthwick.

Francis Borthwick, second son to James Borthwick of Harelaw, was served with a criminal indictment for blasphemy, at the instance of his Majesty's Advocate, and of James Cockburne in Dudingstone, *informer against him*. As he did not choose to run the risk of a trial, sentence of outlawry was pronounced against him for his contempt and disobedience. It set forth, That he had been often cited to appear that day before the Court of Justiciary to answer to a charge of blasphemy: that he was born of Christian parents, baptised and educated in the Christian Church, and continued in the profession of Christianity, and in communion of the *Christian Catholic Church* till the fourteenth year of his age: that he then went abroad to follow the business of a

\* Mackenzie's Criminal Trials, tit. 6. § ult. Our Scandinavian ancestors used to pour forth immoderate libations to the health of their gods; hence, when the Pagan religion yielded to the doctrines of the Gospel, in Germany, and several northern nations, the Church found it convenient to indulge the people with a bumper to the health of our Saviour, the apostles, and the saint; Mallet's Northern Antiquities, vol. 1. p. 137.

1696 merchant, and was seduced to a shameful apostacy from the most holy faith, and to profess himself openly *to be a Jew, and that he was circumcised*: that upon his return to Scotland, he at Edinburgh, and the neighbourhood thereof, did rail against our Lord and Saviour Jesus Christ,\* denying him to be God, and affirming him to be mere man and a false prophet, and outrageously reviling him by such other blasphemies as were not fit to be uttered; renouncing and cursing the holy sacrament of his baptism, and imprecating vengeance upon himself if ever he should return to the Christian religion. If the accused was truly mad enough to undergo circumcision, he was at least not so mad as to appear before the Court of Justiciary; and sentence of outlawry was therefore pronounced against him. The last trial for blasphemy was that of Thomas Aikenhead.

Thomas Aikenhead appears to have been about twenty years of age; his father†, who had been a surgeon in Edinburgh, was dead. Sir James Stewart, his Majesty's Advocate, by special order of the Privy Council, served him with a criminal indictment‡ before the Court of Justiciary for blasphemy.

\* Records of Justiciary, June 15th, 1681.

† I have discovered an anecdote concerning the prisoner's father. He was cited before the Privy Council on the 20th April, 1682, for selling amorous and provocative drugs, by which it was alledged that a woman would have lost her life, had not one Dr. Irvine given her an antidote. The Privy Council referred the case to the College of Physicians, and the College sagaciously reported *that it was unsafe to use such medicines, without first taking their advice*; Fountainhall, vol. I. p. 183.

‡ Records of Justiciary, December 23, 1696.

The libel sets forth, that blasphemy against God, or any of the persons of the blessed Trinity, *or against the holy scriptures, or our holy religion*, is a crime of the highest nature, and severely punishable by the laws of God, by those of this and every well governed realm, and particularly by acts of parliament, Charles II. parl. 1. sess. 1. chap. 21.; and by William, parliament A. D. 1696, sess. 5. c. 11. 1696

That notwithstanding, the prisoner had repeatedly maintained, in conversation, that theology was a rhapsody of ill invented nonsense, patched up partly of the moral doctrines of philosophers, and partly of poetical fictions and extravagant chimeras: that he ridiculed the holy scriptures, calling the Old Testament Ezra's fables, in profane allusion to Esop's Fables: that he railed on Christ, saying, he had learned magic in Egypt, which enabled him to perform those *pranks* which were called miracles: that he called the New Testament the history of the impostor Christ: that he said Moses was the better artist and the better politician; and he preferred Mahomet to Christ: *that the holy scriptures were stuffed with such madness, nonsense, and contradiction, that he admired the stupidity of the world in being so long deluded by them*: that he rejected the mystery of the Trinity as unworthy of refutation; and scoffed at the incarnation of Christ, saying, that a *Theanthropos*, or God-man, was as great a contradiction as a *hirco-cervus*, or goat-stag, or that a *quadratum* was a *rotundum*: that he laughed at the doctrine of redemption: that he said the notion of a spirit was a contradiction: that he cursed Christ, and argued against the being of God, maintaining, *that God, the*

1696 *World, and Nature, are all one thing; and that the*  
 World existed from all eternity: that he said the inventors of the scriptural doctrines would be damned, *if there was such a thing as rewards or punishments after this life; and that Christianity itself would soon be extirpated: that his impiety was so audacious, that, as he passed by the Tron Church in a cold night, he said to a companion, he could wish to warm himself in a place Ezra called Hell: and, lastly, that he often uttered these or the like speeches within the last twelvemonth, without provocation, and merely from malice against God and Christ.*

The Court found the railing against, or cursing any of the persons of the Trinity, relevant to infer the pains of death; and the other crimes relevant to infer an arbitrary punishment.

No counsel appeared for the prisoner; nor does it seem that one word was urged in his behalf during the course of the trial. Four or five witnesses were examined; one of them a writer in Edinburgh, the rest students at the University, lads from eighteen to twenty, or twenty-one years of age. They proved most of the articles of the libel, with this addition, that the prisoner said he was confident Christianity would be utterly extirpated by the year 1800. There was however a material defect in the evidence. The article most highly criminal, viz. the railing against God, and cursing our Saviour, was not proved at all, but was an inference drawn by the jury from the prisoner's cursing Ezra, and saying that the inventors of the scriptural doctrines would be damned, if there be such a thing as damnation.



The jury\* unanimously found the prisoner guilty of railing against God, railing at and cursing Christ, and of the whole other articles in the libel. This verdict the jury, *even by the statute, were not warranted to pronounce.*—The railing against God, and cursing Christ, ought to have been facts directly proved, and not inferences drawn from cursing the inventors of scriptural doctrines; and as for denying any of the persons of the Holy Trinity, it was not the denial, but obstinately persisting therein, which by the statute subjected the offender to a capital punishment. 1696

Besides these defences, had the Court been endowed with the humanity to appoint counsel for the prisoner, it would undoubtedly have been pled for him, that these were rash words, drawn from him in the heat of controversy, which by no means coincided with his serious notions; and that he heartily repented of the warmth which betrayed him into expressions so dissonant from his own sentiments, and so offensive to the feelings of others. Had these defences been offered for him, the jury could not, without being guilty of perjury, have convicted him

\* The following men composed the jury: James Bouden late baillie of Edinburgh, George Clerk (chancellor, *i. e.* foreman of the jury) late baillie there, Michael Allan, late dean-of-guild, Charles Chartres, late baillie, Robert Foresier, late *kirk-treasurer*, Adam Brown, (clerk) late baillie, Alexander Thomson, late deacon-convenor, Jerom Robertson, *periwig-maker*, James Maclurg, late dean-of-guild, Patrick Thomson, late treasurer, William Pattoune, late baillie, Robert Elphinstoune of Lossness, George Mossman, stationer, George Fullertoun. Five person summoned on the jury refused to attend, and were fined 100 merks each.

1696 of *obstinately persisting to deny the Trinity*, which the statute required.

The verdict was returned, and sentence pronounced against the prisoner on *Christmas Eve*, ‘To be taken to the Gallow-lee on the eighth of January, between the hours of two and four in the afternoon, and to be hanged; his body to be buried at the foot of the gallows, and his moveable estate to be forfeited.’—Mercy was asleep\*, as well as Justice and Science; so the dreadful sentence was executed!

\* Two men were found guilty of house-breaking and robbery, attended with very aggravating circumstances, some days before the prisoner. They were indulged in four weeks longer than him as to day of execution. Records of Justiciary, December 22, 1696, January 4, 1697.

## OF OTHER CRIMES AGAINST RELIGION AND THE STATE.

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*Trial of John Ogilvie, Jesuit, for saying of Mass, acknowledging the Pope to be Judge in Controversies of religion, and declining to answer certain Questions put by his Majesty's Commissioners, concerning the Pope's power to excommunicate Kings, the murder of a King excommunicated and deposed by the Pope, and a Subject's being absolved from the allegiance due to such a King.*

JOHN OGILVIE, a Jesuit, was tried before the <sup>1615</sup> Magistrates of Glasgow; judges specially appointed for the trial by the Lords of Privy Council.\* He was a priest equally devoid of the hypocrisy which characterises the most infamous, and the liberality which adorns the most enlightened of the clerical order. He possessed a considerable share of *acumen ingenii*; but his strong and clear intellect was strangely warped with bigotry.

The prisoner was born in the north of Scotland.

\* A true relation of the proceedings against John Ogilvie, a Jesuit, &c. Edinburgh, printed by Andro Hart, A. D. 1615.—This account differs little in point of fact from that published at Douay, the same year, from a manuscript written by the prisoner, and continued by his fellow captives; except that the one, perhaps, suppresses, and the other may exaggerate his sufferings.

1615 He had been out of the kingdom for upwards of twenty years, and had returned in the month of June preceding his trial. The public offence which he gave by the statutory crimes of saying mass, and of endeavouring to make converts to the Catholic religion, was aggravated by intemperate expressions of religious zeal; and as the prisoner had been lately in England, his indiscreet language, joined to the recent conspiracy of the gun powder treason, and the general odium which Papists laboured under, afforded a pretext to the abettors of kingly tyranny and of reformed zeal to insinuate, that the prisoner might be embarked in some desperate enterprise.

Many priests had, of late, smarted under the rod of justice;\* but the crown of martyrdom was reserved for the prisoner. William Murdoch, in particular, for the *crime of saying mass*, had been sentenced to stand on the pillory, at Edinburgh, two hours, in his pontifical robes; then a fire to be kindled, and his robes and instruments of worship to be burned; and the priest to be transported and banished his Majesty's whole dominions for life, never to return under pain of death.

The prisoner was apprehended by order of the Archbishop of Glasgow, (for in that city he chiefly sculked) on the 4th of October, 1614, and was next day examined before his Grace and the Bishop of Argyle, and six other persons of note. He was required to take an oath, that he should tell nothing but the truth, in so far as should be demanded of him. He replied, that he would take it, with an exception to any articles that should affect his own

\* Records of Justiciary, 25th September, 1607.

life and fortune, or tend to criminate others. Being answered, that every question which could be proposed to him, must concern some of these articles. He took the oath, with this reservation, that, when he found a question impertinent, he would either say nothing, or declare simply, that *he would not tell*. He was interrogated accordingly; but nothing material could be drawn from him: for, whatever indiscretions escaped him, he resisted with a fortitude which does him infinite honour, every menace with which his inquisitors endeavoured to extort from him a discovery of the persons who had incurred a penalty by harbouring him. He was remanded to prison, and loaded with heavy irons.

He was afterwards brought to Edinburgh, and examined afresh before a new set of commissioners; but, as either his innocence, or his caution, screened him from a declaration of a criminal tendency, he was threatened with the torture; and he declared his readiness to suffer whatever torments they should be pleased to inflict. But some person whom (I suppose) long practice had taught to tread with caution the paths of iniquity, advised, that instead of assailing the prisoner with acute torments, they should keep him for some nights without sleep, as being the surest means, if not of staggering his resolution, at least of undermining his judgement. This *happy device* was followed to such an extent, that according to the prisoner's account,\* he was kept from sleep for eight days and nine whole nights, by the thrust-

\* Relatio Incarcerationis et Martyrii P. Joannis Ogilbei, &c. &c. Duaci, typis viduae Laurentii Kellami sub signo Agni Paschalis, 1615.

1615 ing of needles and pins into his flesh; which had such an effect upon him, that he hardly knew what he either said or did, and often could not recollect so much as what town he was in. He relaxed so far as to name some of the persons who harboured him; and the commissioners flattered themselves he would become sufficiently pliable. In the mean time, upon the approach of the Christmas holidays, the Archbishop of Glasgow returned to his diocese, and took his prisoner along with him, lodged him in his house, and entertained him well.\* In the beginning of January, new commissioners were appointed to take the prisoner's opinion on certain special interrogatories propounded by his Majesty. To these he answered in substance, declaring, ' That he thought ' the Pope had a right of jurisdiction over the King ' in spiritual affairs; but that the prisoner was not ' bound to declare his opinion as to temporal, except ' to the Pope, or those authorised by him: that the ' Pope had authority to excommunicate the King, or ' any person who had been initiated into Christianity ' by baptism: that, as to the Pope's having a right to ' depose an excommunicated Prince, or to absolve ' his subjects from their allegiance, or whether it ' were lawful to kill such a prince, he was not bound ' to declare his opinion.'—As if this declaration was not sufficiently disgusting to the dainty palate of the British Solomon, the prisoner volunteered in adding, that he condemned the oaths of supremacy and allegiance, as put in England, insisted that this should be inserted as part of his declaration, and sub-

\* Relatio Incarcerationis, &c.

scribed the whole, ‘ *Johannes Ogilveus, Societatis* 1615-  
‘ *Jesu.*’ 

Nothing more was wanting to accomplish his destruction. The virtuous and learned Sir Thomas More had fallen a sacrifice *about eighty years before*, to a capricious tyrant, by saying, that a question relating to the supremacy was like a two-edged sword; if one answered the one way, it confounded the soul; if the other, it destroyed the body. The prisoner went much further; he vehemently persisted in his declaration, notwithstanding the endeavours of the King’s commissioners to prevail on him to soften it; and an order from his Majesty to the Lords of the Privy Council was received, commanding them to bring him to trial.

He was accordingly indicted upon three statutes, viz. James I. Parl. 3. chap. 48.; James VI. Parl. 8. c. 129. and Parl. 18. c. 1. But although the indictment set forth, with manifest falsehood, that the first of these acts was guarded with the pains of treason; and, although the last of them contains *the unparalleled absurdity of* ‘ *annulling and rescinding every thing done, or hereafter to be done, in prejudice of the royal prerogative, in any time bygone or to come;*’ yet neither of them could have served to condemn the prisoner, they being declaratory, but not penal acts; for, although they declared the King’s power in all cases, and over all persons, they had no penal sanction whatever annexed to the breach. The statute James VI. Parl. 8. c. 129. was not so favourable for the prisoner. It confirms the royal power over all persons, and in all cases, spiritual and temporal; and declares the King and his Privy Council to be com-

1615 petent judges to all persons, in all matters, ‘concern-  
 ing which they should be apprehended, or charged  
 ‘to answer such things as should be inquired of  
 ‘them. And that none apprehended or charged to  
 ‘that effect should decline the authority of the King  
 ‘or his Council under pain of treason.’ This statute,  
 broad as it is, could not have affected the prisoner’s  
 life, had not a false construction been put upon it;  
 by comprehending under it not only those who,  
 when called before the King and Council, *declined*  
*their jurisdiction, but also those who declined to answer*  
*every impertinent or insidious question that possibly*  
*might have involved themselves in the acknowledgement*  
*of a capital crime.* This construction the King’s  
 Counsel does indeed put upon the statute, in the  
 course of this trial. I apprehend that the words of  
 the act, which, it must be confessed, are obscure  
 and ambiguous, do not warrant it. If they do, I  
 have only to observe, that to oblige a person *to an-*  
*swer, under pain of death, to an interrogatory which*  
*may affect his own life,* is, perhaps, the greatest pitch  
 of tyranny and iniquity that any legislative body  
 ever attained.

The indictment proceeds to charge, that, notwith-  
 standing these statutes, the prisoner had renounced  
 his natural allegiance, and had endeavoured, by con-  
 ferences, enticements, *mass-saying*, and other crafty  
 means, not only to corrupt his Majesty’s subjects in  
 religion, but also to pervert them from their duty to  
 their Prince, till he had been discovered and appre-  
 hended by the Archbishop of Glasgow.—His declar-  
 ation of the 18th of January is then founded on; and  
 many big sounding words follow, ‘That the prisoner



' was guilty of *most damnable high treason*, in not an- 1615  
 ' swering, acknowledging,' &c. &c. Towards the  
 conclusion, the libel sets forth his Majesty's great  
 reluctance to apply the severities of the law to the  
 sayers and hearers of mass, and his gentleness to-  
 wards such offenders, in only punishing them by  
 imprisonment and banishment, of which the pri-  
 soner had experience in the fate of his own accom-  
 plices; but that he, *by the three last articles in his de-  
 claration*, showed a professed purpose to effect the  
 destruction of his Majesty's person and government;  
 by all which, he had committed heinous and unpar-  
 donable treason.

The Archbishop of Glasgow, James Marquiss of  
 Hamilton, Robert Earl of Lothian, William Lord  
 Sanquhar, John Lord Fleming, Robert Lord Boyd,  
 and Sir Walter Stewart, were assessors to the Court;  
 and Sir George Elphinstone of Blytheswood was the  
 chancellor of a very respectable jury. The indict-  
 men, the statutes, and the prisoner's declaration,  
 being read over, the Advocate-depute addressed him  
 in a speech, telling him, that he was not prosecuted  
 for saying mass, nor for seducing the people to Pop-  
 ery, *nor for any thing that concerned his conscience*,  
 but for declining the King's authority, and main-  
 taining treasonable opinions, as, '*the statutes libelled  
 on made it treason not to answer the King or his  
 council in any matter which should be demanded.*'\*

\* It is somewhat remarkable that the son or grandson of Ed-  
 monston of Duntreath, one of the jurymen who convicted the  
 prisoner, was fined by the Privy Council in 9000 merks, for re-  
 fusing to answer upon oath, whether he had harboured one For-  
 ester, a field preacher, who was under sentence of banishment, &c;

1615 This *conscientious* harangue being finished, the prisoner was allowed to state objections, if he had any, why the persons named should not pass upon his jury. To this he made answer, that ‘the jury-  
 ‘men were either friends to his cause, or enemies;  
 ‘*if enemies, they could not be admitted upon his trial;*  
 ‘*if friends, they should stand prisoners at the bar*  
 ‘*with him.*’ This ridiculous objection being over-ruled, and the indictment, the statutes, and the prisoner’s signed declaration upon the interrogatories propounded by the King, being again read over, the prisoner, who had no counsel, was desired to say what he could in his own behalf. This the unhappy man performed to a title, in a speech replete with imprudence, extravagance, and bigotry, declaring, ‘that he repented of nothing but not having been busy enough in making converts; and  
 ‘*that if all the hairs in his head were priests they*  
 ‘*should all come into the kingdom.*’ The Archbishop then addressed the jury; and the King’s counsel finished the whole, by protesting for *an assize of wilful error* if they should acquit the prisoner.

The prisoner was served with his indictment in the last week, and was brought to trial on the last day of February. The jury being inclosed, returned to the Court, which continued sitting, a speedy and unanimous verdict, finding the prisoner guilty of the whole treasons libelled. He was sentenced to be taken immediately from the Court to the place of ex-

June 30, 1681.; Fountainhall’s Decisions, p. 145. Now, refusing to answer upon oath was the only crime which was proved against the prisoner Ogilvie.

ecution, and there to be hanged and quartered. He 1615 then cried out, 'God have mercy upon me! If there be here any hidden Catholics, let them pray for me; but the prayers of heretics I will not have.'

After a short interval allowed for penitence and prayer, (perhaps also for erecting the scaffold) he was hanged that same afternoon, but the quartering was dispensed with.

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A few months after, William Sinclair, advocate, Robert Wilkie, brewer, and Robert Cruikshanks, stabler in Edinburgh, were tried before the Court of Justiciary for *resetting*,\* that is, giving meat and lodging to the above John Ogilvie and another Jesuit priest. They were convicted; and by express warrant of his Majesty were sentenced to be hanged: but by a posterior warrant the sentence was changed into perpetual banishment.

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*Mr. John Wallace for saying of Mass, being habit and repute a Popish Priest, and refusing to take the Formula.*

THE penal laws against Papists had amounted to a 1722 most sanguinary pitch of persecution; but, as in most cases where the punishment bears no proportion to the offence, the humanity of mankind is unwilling to furnish the public prosecutor with evi-

\* Records of Justiciary, July 14, August 15, and 20, 1615.

1722 dence, so, in the *crime of Popery*, the state had to enact a law for ascertaining a proof of the offence. By this law it was declared, that any person who was *habit and repute*,\* that is, generally holden and deemed to be a Popish Priest, and who should refuse to take a formula therein prescribed, should be banished for life, never to return under pain of death. By the same law, the being found in a chapel where there were altar and mass-book, &c. subjected the person so found to perpetual banishment. Papists, or those refusing to take the formula, by this statute, are likewise declared incapable of all succession whatever; the same to devolve upon the *next Protestant heir*. And those who *apostize from 'the true Protestant religion,'* by professing the Popish, are also declared to forfeit their whole heritable estate to their next Protestant heir.

Upon this law Mr. Wallace was indicted.† It was charged against him, that the magistrates‡ of the Canongate, a suburb of Edinburgh, had *sent a parcel of soldiers into the house of Elizabeth, Duchess Dowager of Gordon* on the 29th of April last, which, by the bye, was a Sunday; that the soldiers there apprehended the prisoner when he was about to say mass; and that he refused to take the formula when tendered to him. He and his surety had granted a bail-bond of a thousand merks Scots to stand trial;

\* William, parliament 1st, sess. 8. c. 3. A. D. 1700.

† Records of Justiciary, August 23, 1722.

‡ These magistrates were entitled to a reward of 500 merks Scots for seizing a priest.

but, as he failed to appear, the bail-bond was forfeited,\* and sentence of outlawry was pronounced against him. 1722

It aggravates not a little that contempt, mixed with horror, which ought to be entertained of certain parts of our penal law, that by the *unrepealed* statute upon which the prisoner was condemned, no parent can put his child to an eminent master in riding, fencing, music, French, or Italian, (for such are mostly Papists) but he must incur a penalty of 500 merks for each offence, which 'may be pursued for *by any Protestant subject*, and upon conviction shall 'pertain to the pursuer for his reward.' What heightens the absurdity is, that one of those masters thus forbidden by *statute* to teach, has a *royal* bounty of £200 a year for teaching.—The trumpet of sedition and fanaticism, blown by the foul breath of ignorance against the repeals of those penal laws; the dismal consequences of the blast; the guilt which those *trumpeters* incurred; and the disgrace which they have brought upon this country, will not be purified by many *lustrums* of liberal science. I shall make no farther commentary upon this statute, and this prosecution, but that it should teach a little moderation of language to that class of people which upon every occasion launches forth its undistinguishing applause, upon the principles of liberty which flowed from the glorious Revolution; and the principles of toleration, so congenial to the meek spirit of the Reformed Religion.

\* So late as April 25, 1755, Alexander McDonald, a Popish priest, *by the way of favour and clemency*, was banished Scotland for life, having refused to take the formula.

*Sir James Ker for celebrating clandestine and irregular marriage.*

1590 *SIR JAMES KER* in Old Roxburgh was deposed from the office of a clergyman on account of misbehaviour, in November, 1583, and was excommunicated on the 26th of May after.\* He continued notwithstanding to celebrate marriage and the sacrament of baptism. For these offences he was tried on the 18th of June, 1590, on an indictment, ‘for lying under  
‘the horrible sentence of excommunication, separate from the suffrage and prayer of the Kirk, and  
‘merit of the blood of Christ, *to the damnation of his soul, continually from the 26th day of March,*  
‘1584: that although he, for misbehaviour, had  
‘been deprived of the clerical function in the month  
‘of November, 1583, he continued notwithstanding  
‘*to abuse the sacraments, by marrying† sundry persons, and baptising of children.*’

The prisoner came in the King's will, i. e. submitted to his Majesty's pleasure, which the King's Advocate declared to be, that the prisoner should stand two hours at the Cross with a paper in his hat denoting his crime; and that he should not commit

\* Records of Justiciary, June 18, 1590.

† The Advocate was here a little out in his divinity. It is an apt illustration of the nicety of the dispute between the Romish and Reformed Churches concerning the number of the sacraments, and of the iniquity of annexing rigorous punishment to a difference of religious opinion, that the King's Advocate, in a criminal libel, should fall into the mistake of stating the celebration of irregular marriage as the abuse of a sacrament.

the like transgression again under pain of death.— 1590  
Let us compare this sentence with that which was  
pronounced in the following trial, in a more en-  
lightened age, and under a more free government.

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*John Connochar for celebrating clandestine and irregular marriage.*

JOHN CONNOCHAR was a nonjuring clergyman of 1755  
the Episcopal Church of Scotland. His residence in  
a wild district of the Highlands, where there was  
not within many miles a man of his knowledge and  
learning, gave him a degree of consequence to which  
his irreproachable morals and unaffected piety added  
singular importance: but his virtues were poisoned  
by his attachment to an unfortunate family; and  
the eminence of his situation and character, which  
in better times would have commanded felicity,  
served only to attract the fire of political vengeance.  
He was marked out as a victim whose ruin was to  
confound the remains of a vanquished party.

The gentry in the North of Scotland professed  
almost universally the Episcopal or Popish religion;  
and meeting-houses were tolerated where public  
worship was performed according to the liturgy  
of the Church of England. But, on the extinction  
of the rebellion 1745, Government thought proper  
to make an indirect acknowledgement of the King's  
title to the throne, in the most solemn addresses to  
God, an indispensable part of the formula. It com-  
manded all Episcopal clergymen, at every time they

1755 celebrated public worship\* before more than five person, to pray for the King and royal family by name. As the gentlemen in that part of Scotland, for the most part, were attached to the house of Stuart, the act met with no other obedience than by many peoples absenting themselves entirely from Church. Still however many devout persons performed a duty which they thought acceptable to God, at the risk of incurring the vengeance of their temporal sovereign. Various prosecutions were accordingly instituted for this offence; and of these, the most remarkable was that against the prisoner.

At the distance of nine years after the extinction of the rebellion, he was apprehended in his own house by a party of soldiers, on a day, (30th of January) upon which it was to be expected that he and his hearers would be engaged in their forbidden worship.† The warrant for his commitment proceeded upon a petition from his Majesty's Advocate to the Lords of Justiciary, setting forth, that Mr. Connochar without having letters of orders in terms of law, and without having taken the oaths to government, had presumed to officiate as a minister, by praying and preaching, and administering the sacraments; also, that his sermons were calculated to sow sedition, and to excite disaffection.

The prisoner having applied to the Lord Justice Clerk to be admitted to bail, his request was granted: but, in the mean time, he was detained in virtue of a new warrant of the Court of Justiciary, pro-

\* George II. an. 19, cap. 38.

† January 30th, 1755. Scots Magazine, vol. 17. p. 207.



ceeding upon a new petition from the Lord Advocate, setting forth, that besides the offences for which the prisoner was at first incarcerated, he was also to be tried on the statute of Charles II. against celebrating clandestine or irregular marriage.—It must be observed, that, by the former of these acts, the prisoner for the first offence could only be subjected to six months imprisonment, but by the latter he might be condemned to perpetual banishment. 1755

A fresh bail-bond being offered, the prisoner was released on the 27th of February; and, on the 10th of April, he was brought to trial before the Circuit Court of Justiciary at Inverary: a district, where the attachments of the people, and the fate of Stewart of Aucharn, who was capitally convicted some time preceding, left no reason to dread that the jury would make any great stretch to acquit the prisoner. He was charged with two offences; the celebrating of marriage without being lawfully authorised by the established Church of Scotland, or by any other legal authority; and celebrating of it in a clandestine and disorderly way, contrary to act Charles II. Par. Sess. 1. c. 34.

It was pled for the prisoner, that the statute libelled on \* had been established directly with a view to support Episcopacy against sectaries; therefore, to turn it as an engine of destruction against that religion which it was meant to protect, was totally to invert its purpose:—That all the acts in favour of Episcopacy had been abolished by William and Mary,

\* Records of Western Circuit Court of Justiciary, April 10, 1755. Scots Magazine, vol. 17. p. 207.

1755 Parl. 1. Sess. 1. c. 5. That it behoved Episcopacy either to be the established religion or not. If it was the established religion, the Priest could not be condemned as unqualified to celebrate marriage. If it was not the established religion, it must be ranked among the sects of nonconformity; and even in that case, the clergyman was equally safe; for all laws against nonconformists were repealed by act 1690, c. 27.—This construction of the statutes was confirmed by the universal sense of the nation; for, although thousands of marriages had been celebrated, not only by Episcopal clergymen, but by dissenters of all sorts, no prosecution had ever been brought on this branch of the statute alone: nay, so little was our law scrupulous as to a clergyman, the celebrator of a marriage being ordained by the established church, that a valid marriage might be pronounced by any civil magistrate: indeed, the ceremony of marriage is totally unessential to its validity.

As to the second offence charged against him, the celebration of marriage, in a clandestine and disorderly way, it was proved on behalf of the prisoner, that the parish-church in which he lived, as well as the next parish, had been for some time vacant; so that in the district where he lived, there was no clergyman but himself, in a space of twenty miles: that he had been scrupulously anxious to celebrate marriage in the most regular manner, both as to the *essential* and *ceremonial* parts of the contract: that when, by the want of public worship in the parish-church, the *ceremonial* part, viz. the publication of the banns, could not be performed, he made the beadle pro-

claim them before witnesses at the church-door; and, 1755  
as to the *essential*, he instructed, that when he celebrated marriage, it was always with the consent of the friends of both parties. Nay, that he had refused to celebrate a marriage in a clandestine manner, although ten guineas had been offered as an inducement.

Notwithstanding these arguments, the Court found the first, as well as the second article of the indictment, relevant to infer the pains of law.

The counsel for the prisoner reminded the jury, that notwithstanding the interlocutor of the Court, they were entitled, if they thought proper, to acquit the prisoner of both charges. But lest the fountain of justice should purify the stream of political vengeance, it was observed from the bench, that the jury could have no room for doubt; *and that nonjur-ing Episcopal clergymen of the prisoner's activity, were dangerous to the present happy establishment.* The jury found the prisoner guilty; but, in respect of certain alleviating circumstances, recommended him to mercy.—He was condemned to perpetual banishment, never to return under pain of death.

*Mr. Daniel Taylor, and twenty-four other Preachers of the Episcopal Communion in Edinburgh, Mr. Arthur Miller, Preacher in Leith, and Mr. Robert Colt, and Mr. James Hunter, Musselburgh, for Preaching to an Episcopal Congregation, without Letters of Orders from a Protestant Bishop; and without Praying for King George by name.*

1716 **HIS** Majesty wrote a letter\* to the Lords of Justiciary on the 12th of May, 1716, setting forth, that he understood there were meeting-houses in Edinburgh, and other parts of Scotland, where divine service was performed without praying for the King and Royal Family; and requiring their Lordships † ‘to give strict orders for shutting up all such meeting houses,’ and for proceeding against offenders in time coming.

The Lords sent an answer to Mr. Secretary Stanhope, representing their alacrity in ordering prosecutions against such offenders; but, as to shutting up such meeting-houses, they observed, ‘We are humbly of opinion, that our forms do not allow such summary procedure till after trial and conviction by due course of law.’ Even then, their Lordships suspected they were authorised only to exact the penalties prescribed by law; but not to shut up the meeting-houses. The Lords, at the same time,

\* The letter is subscribed ‘GEORGE R.’ and countersigned by Mr. Secretary Stanhope.

† Records of Justiciary, May 18, and 21. June 11, 18, and 28. December 31, 1716; February 13. June 19, 1717.

ordered the Crown lawyers, with all diligence, to 1716 prepare indictments against all Episcopal ministers guilty of this offence.

The prisoners were accordingly served with an indictment, setting forth, that a statute of Queen Anne was enacted for preventing disturbance to those of the Episcopal communion in Scotland: that this statute specially provided, that no person should presume to officiate as a pastor in such congregation, without having previously lodged with the justices of peace letters of orders from a Protestant Bishop; and without also praying in express words, some time during the service, for '*her most sacred Majesty Queen Anne, and the most excellent Princess Sophia, Electress and Duchess Dowager of Hanover, while living*:'\* That notwithstanding the demise of the late Queen, these clauses remained perpetual conditions; and that by an order of the Regency, August 1st, 1714, the clergy were required to pray in express words for his most sacred 'Majesty King George:' that nevertheless the prisoners had presumed to celebrate the Episcopal worship without letters of orders, which was contrary to the establishment of the Church of Scotland, as settled by act of Parliament, and ratified by the Union; and that they had also neglected to pray for King George: for which transgressions the prisoners ought to be punished in terms of the act.

Informations were lodged for both parties; but, as the arguments for the prisoners were over-ruled, most of them to save trouble to the Court confessed

\* Statute 10th Anne, cap. 7.

1716 both charges. The whole of the prisoners *except one who had produced letters of orders from an ex-auctorated\* Scottish Bishop*, were debarred from preaching till they should produce letters of orders in terms of the act; and twenty-one of them were fined £20 Sterling each, half to the informer, and half to the poor of the parish; a sentence palpably illegal; for, as this penal statute annexed the penalty of £20 to the not praying *for Queen Anne, while living*, it was repugnant to every rule of law, to every principle of liberty, to extend the penalty to the not praying *for King George after she was dead*. As the Court had omitted to grant *letters of horning*,† his Majesty's Advocate, about six months after, prayed the Court for letters of horning, seeing *no informer would apply*; and they were granted accordingly for £10 against each of these persons, *to be paid to his Lordship as informer*.

About the same time, a petition was presented to the Court by the magistrates of Edinburgh, setting forth, that their Lordships, by their sentence of the 28th of June, had commanded all sheriffs and magistrates of boroughs to prevent those clergymen from officiating within their districts; that however they had now produced their orders, which were registered

\* An objection was stated before the magistrates of Edinburgh, to the letters of orders of Mr. Greenshiels, as granted by an ex-auctorated Bishop. The objection was sustained by the magistrates, and afterwards by the Lords of Session; but the decree was reversed on appeal. Journal of the House of Lords, March 1, 1710.

† A form of the law of Scotland, necessary for distraining the person and goods of a debtor.

as the statute directs; that the Lord Advocate had delivered a message to the magistrates from his Royal Highness the Regent, signifying his opinion that they had been remiss in executing the sentence of Justiciary, and his expectation that they would pay more zealous attention to carry it into execution: and the magistrates being at a loss how to proceed, in respect of the letters of orders being produced, craved the directions of the Court. Their Lordships returned an answer to the petition of the magistrates, dark and equivocal as the Sybilline Oracles, importing that the process was ended; that they could not alter their own sentence, ‘and the said Lords looked on the said sentence as containing a full warrant for the execution of the same.’—I apprehend that the Lords of Justiciary and the magistrates of Edinburgh had reciprocally endeavoured to devolve on each other the odium of the *people for executing* of the sentence, or the indignation of the *Prince for not executing of it*. It appears that the shutting up of meeting-houses was by no means rigorously enforced; for I find several of those very clergymen within a few months again convicted for the same offence. Indeed, the criminal records, for some years after this, are in a manner engrossed with prosecutions against Episcopal Nonjurors.

## OF WITCHCRAFT.

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1588 **WITCHCRAFT** first made its appearance in our criminal code, at a time when the broaching of a new set of religious notions excited a passionate desire for the attainment at extraordinary purity and strictness in doctrine and in morals. Shortly before the Reformation was established by law, an act was passed, annexing a capital punishment to the practising of sorcery, or consulting with witches.\* From the words of this act, which are not a little ambiguous, there is reason to suspect that the Legislature did not believe in sorcery; and that the punishment provided by the statute was annexed not to the crime of witchcraft, but to the impiety and blasphemy of pretending to, or believing in, such supernatural powers.

### *Alison Pearson.*

Alison Pearson in Byre-hills, Fifeshire,† was convicted of practising sorcery, and of invoking the devil. She confessed that she had associated with the Queen of the Fairies for many years,‡ and that she had friends in the Court of *Elfland*, who were of her own blood. She said that William Simpson, late the King's smith, was, in the eighth year of his age,

\* Mary, Parl. 9. c. 73. A. D. 1563.

† Rec. of Just. 18th May, 1588.

‡ In the original it is Queen of *Elfland*.



carried off by an Egyptian to Egypt, where he remained twelve years; and that this Egyptian was a giant: that the devil appeared to her in the form of this William Simpson, who was a great scholar, and a doctor of medicine, who cured her diseases: that he has appeared to her, accompanied with many men and women, who made merry with bagpipes, good cheer, and wine: that the *good neighbours*\* attended, and prepared their charms in pans over the fire; that the herbs of which they composed their charms, were gathered before sunrise; and that with these they cured the Bishop of St. Andrews of a fever and flux. She underwent all the legal forms customary in cases of witchcraft, *i. e.* she was convicted and condemned, strangled and burned.

*Janet Grant and Janet Clark.*

Janet Grant and Janet Clark† were convicted of 1590 bewitching several persons to death, of taking away the privy members from some folks, and bestowing them on others, and of raising the devil.

*John Cunninghame.*

It was proved against John Cunninghame, that the devil appeared to him in white raiment,‡ and promised, that, if he would become his servant, he should never want, and should be revenged of all his enemies: that he was carried *in an ecstasy* to the kirk

\* *Good Neighbours* was a term for witches. People were afraid to speak of them opprobriously, lest they should provoke their resentment.

† Records of Justiciary, 7th August, 1590.

‡ Ibid. 26th December, 1590.

1590 of North Berwick, where the devil preached to him, and many others, bidding them not spare to do evil, but to eat, drink, and be merry; for he *should raise them all up gloriously at the Last Day*: that the devil made him do homage, by kissing his \*\*\*\*. That he (the prisoner) raised the wind on the King's passage to Denmark: that he met with Satan on the King's return from Denmark; and Satan promised to raise a mist, by which his Majesty should be thrown upon the *coast of England*; and thereupon threw something like a football into the sea, which raised a vapour.

*Agnes Sampson.*

Agnes Sampson in Keith,† a grave matron-like woman, of a rank and comprehension above the vulgar, was accused of having renounced her baptism, and of having received the devil's mark; of raising storms to prevent the Queen's coming from Denmark; of being at the *famous meeting* at North Berwick, where six men, and ninety women, witches, were present, dancing to one of their number, who played to them on a Jew's harp. It was charged in the indictment, that the devil was present at this meeting; and started up in the pulpit, which was hung round with black candles: that he called them all by their names, asked them, If they had kept their promises, and been good servants, and what they had done since the last meeting: that they open-

† Rec. of Just. Jan. 27, 1590. A story is told of this woman in Spottiswood's Hist. p. 383. which is nowise confirmed by the record. His fable is absurd; and seems to have been invented by some zealous believer in the *divine right of Kings*.

ed up three graves, and cut off the joints from the dead bodies' fingers, *and that the prisoner got for her share two joints and a winding sheet, to make powder of to do mischief:* that the devil was dressed in a black gown and hat; and that he ordered them to keep his commandments, which were to do all the ill they could, and to kiss his \*\*\*\*.

*Euphan M'Calzeane.*

Euphan M'Calzeane was a lady possessed of a considerable estate in her own right. She was the daughter of Thomas M'Calzeane Lord Cliftonhall, one of the Senators of the College of Justice, whose death in the year 1581, spared him the disgrace and misery of seeing his daughter fall by the hands of the executioner. She was married to a gentleman of her own name, by whom she had three children. She was accused of treasonably conspiring the King's death by enchantments;† particularly by framing a waxen picture of the King; of raising tsorms to hinder his return from Denmark; and of various other articles of witchcraft. She was heard by counsel in her defence; was found guilty by the jury, which consisted of landed gentlemen of note; and her punishment was still severer than that commonly inflicted on the Weyward Sisters,—she was *burned alive*, and her estate confiscated. Her children, however, after being thus barbarously robbed of their mother, were restored by act of Parliament‡ against the forfeiture. The act does not say that the sentence was unjust; but that the King was *touched in honour and*

† Records of Just. 8th May, 1591.

‡ Unprinted Acts, A. D. 1592. No. 70.

1591 conscience to restore the children. But to move the wheels of his Majesty's conscience, the children had to grease them, by a payment of five thousand merks to the donator of escheat,\* and by relinquishing the estate of Cliftonhall, which the King gave to Sir James Sandilands of Slamanno.

As a striking picture of the state of justice, humanity, and science, in those times,† it may be remarked, that this Sir James Sandilands, a favourite of the King's, (*'ex interiore principis familiaritate,'*) who got this estate, which the daughter of one Lord of Session forfeited, on account of being a witch, did that very year murder another Lord of Session in the suburbs of Edinburgh, in the public street, without undergoing either trial or punishment.

*Patrick Lawrie.*

1605 Among many acts of witchcraft for which Patrick Lawrie was committed to the flames, there were his consulting with, and receiving from the devil a hand belt;‡ in one end of which '*appeared the similitude of four fingers and a thumb, not far different from the claws of the Devil;*'—his bewitching Bessie Sands's corns, and taking the whole strength and substance out of them for ten years successively;—his enchanting certain milk cows, which thereby, instead of milk, yielded nothing but blood and matter;—and his curing Elizabeth Crawford's child, which, for eight or nine years, had been afflicted with an incurable disease.

\* He who obtains a gift of the forfeiture.

† *Johnstoni Historia Rerum Britannicarum*, p. 172. See also p. 174. of this work.

‡ Records of Justiciary, July 23, 1605.

*Margaret Wallace.*

Margaret Wallace† was tried before the Circuit 1620 Court of Justiciary. The Duke of Lennox, the Archbishop of Glasgow, and Sir George Erskine of Inner-<sup>w</sup>teil, sat as assessors to the judges, and an eminent counsel was heard in behalf of the prisoner. She was accused of inflicting and of curing diseases by enchantment; but it was not specified what spells she employed. It was *libelled* against her, that on being taken suddenly ill she sent for one Christian Graham, a notorious witch, who afterwards suffered a capital punishment, and that this witch transferred the disease from the prisoner to a young girl: that the girl being thus taken ill, her mother was advised by the prisoner to send for Christian Graham, who answered, that her confidence was in God, and she would have nothing to do with the devil or his instruments: the prisoner replied, *that in a case of this sort Christian Graham could do as much as God himself; and that without her aid there was no remedy for the child*: but the mother not consenting, the prisoner without her knowledge sent for Christian, who muttered words, and expressed signs, by which she restored the child to health, &c. Her counsel urged, that the indictment was by much too general: that it ought to have been specified, not simply that she did enchant, but also by what kind of spells she performed her incantations: that supposing Christian Graham to have been a witch, and that the prisoner when taken ill consulted her, still he was entitled to plead that the prisoner consulted her on ac-

† Records of Justiciary, March 20, 1620.

1620 count of her medical knowledge, and not for her skill in sorcery: that as to the blasphemous expressions, however well they might found a trial for blasphemy, they by no means inferred the crime of witchcraft; and he quoted many authorities from the civil and canon laws. He farther challenged one of the assizers, because one of the articles charged against the prisoner was her having done an injury to his brother-in-law.—The whole defences were repelled by the judges; and the jury found the prisoner guilty.

*Isobel Young.*

1629 Isobel Young in East Barns\* was accused of having stopped by enchantment George Sandie's mill *twenty-nine years before*; of having prevented his boat from catching fish while all the other boats at the *herring-drave*, or herring-fishery were successful; and that she was the cause of his failing in his circumstances, and of nothing prospering with him in

\* Records of Justiciary, Feb. 4, 1629. In this trial mention is made of the proprietor of the cattle having applied to Lockhart of Lee for the use of his *curing stane* to cure the cattle; and that he graciously condescended to give them some water in which it had been dipped; and the water having (I suppose) derived virtue *from the stone*, as the Pool of Bethesda *from the angel*, the cattle were thought to be a good deal the better.—This famous instrument of superstition has maintained its reputation for many centuries. It is said to have been brought home by Lockhart of Lee, who accompanied the Earl of Douglas in carrying King Robert the Bruce's heart to the Holy Land. It is called the *Lee Penny*. Besides its curing of cattle, it has another virtue, that it *can never be lost*. It is still in the possession of that ancient family; and people from various parts of Scotland, and even of England, whose cattle were infected, have made application within these few years for water in which *the stane* had been dipped.

the world: that she threatened mischief against one 1629 Kerse, who thereupon lost the power of his leg and arm: that she entertained several witches in her house, one of whom went out at the roof in likeness of a cat, and then resumed her own shape: that she *took a disease off her husband, laid it under the barn floor, and transferred it to his nephew, who when he came into the barn saw the firlot hopping up and down the floor:* that she used the following charm to preserve herself and her cattle from an infectious distemper, viz. to bury a white ox and a cat alive, throwing in a quantity of salt along with them: that she had *the devil's mark*, &c.

Mr. Laurence Macgill and Mr. David Primrose appeared as counsel for the prisoner. They pleaded, that the mill might have stopped, the boat caught no fish, and the man not prospered in the world, from *natural causes*; and it was not *libelled* by what spells she had accomplished them: that, as to the man who had lost the power of his leg and arm, *first*, she never had the least acquaintance with him; *secondly*, she offered to prove that he was lame previous to the threatening expressions which she was said to have used: that the charge of *laying a disease under a barn floor* was a ridiculous fable, taken probably from a similar story in Ariosto; and that two years had elapsed between her husband's illness and his nephew's: that what the prosecutor called *the Devil's mark*, was nothing else than the scar of an old ulcer; and that the charge of her burying the white ox and the cat, was false.

The celebrated Sir Thomas Hope, who was counsel for the prosecution, replied, that these defences ought to be repelled, and no proof allowed of them,

1629 because *contrary to the libel*; that is to say, in other words, *because what was urged by the prisoner in her defences contradicted what was charged by the public prosecutor in his indictment*. The defences for the prisoner were over-ruled.—Is it needful for me to add that she was convicted, strangled, and burned?

This most incredibly absurd and iniquitous doctrine, of repelling defences because contrary to the libel; this system of *legal murder*, was till the present century a received maxim of criminal jurisprudence in Scotland. Thus, besides in the present, and sundry other trials for witchcraft, when John Young was accused of the murder of Archibald Reid, by a wound with a hanger on the *shackle-bone*, *i. e.* the wrist, given *about four or five months preceding his death*, he pleaded, that the wrist was not one of the noble parts where a mortal wound could be inflicted: that the indictment set forth the wound to have been given about four or five months preceding the death of the deceased; and it was an established maxim of law, that if a person survived a wound forty days, his death must be imputed to some other cause: that the deceased had a complete reconvalence, wrought at his usual trade of a smith, reaped his own corn, and gathered it in. The counsel for the prosecution insisted that these defences should be repelled, *in respect of dittay*, (*i. e.* as being contrary to the libel) and the Court over-ruled them.\* When a person of the name of Mowat was prosecuted for mutilation by two gentlemen of the name of Cheyne, he pleaded that the wounds he gave were in self-defence. Sir Thomas Hope, Lord Advocate, who in

Rec. of Just. July 50, 1630.



the course of that month was appointed Lord Justice 1629 General for life, opposed the defence, and insisted it should be repelled *as being contrary to the libel*. To exclude the prisoner from the benefit of his *exculpatory* evidence, he added another argument equally founded in good sense and equity, 'that the 'pursuer's witnesses were examined upon all proper interrogatories offered by the prisoner, *therefore* 'there was no necessity for his leading other witnesses.' The Court repelled the prisoner's defence, and refused to allow him *to adduce witnesses* to prove the fact\*. When Mr. William Somerville was tried for the murder of Elisabeth Renton, he offered in his defence to prove that the wound given the deceased† was not mortal; that she walked on the night she was wounded to her brother's house, three miles distant; that she did not take her bed, but continued to work as a servant in her usual employments for three months. At last, having gone to attend in his illness her brother who died of a spotted fever, she caught the infection, and died of that disease. These defences however were over-ruled, were not admitted to proof, because contrary to the indictment, wherein it was expressly libelled that he gave her a mortal wound.

When William Mackie was tried for killing James Murray in a duel, he pleaded it was in self-defence, for Murray had assaulted him with a drawn sword: to which it was replied, that the defence could not be sustained because the libel expressly charged that they fought in consequence of previous mutual provocation, and the defence was over-ruled. Accord-

\* Rec. of Just. July 15, 1642.

† M'Kenzie's Criminals, tit. 23, sect. 2.

1629 ing to the same doctrine, the defence of *alibi* must  
 ~ have been rejected by this dreadful tribunal.\*

*Alexander Hamilton.*

1630 Alexander Hamilton (if we may trust his judicial  
 ~ confession) met the devil in the likeness of a black  
 man riding on a black horse.† Hamilton renounced  
 his baptism, and engaged to become the devil's ser-  
 vant, from whom he received four shillings Ster-  
 ling. When he wanted an audience of his Infernal  
 Majesty, he was instructed to beat the ground thrice  
 with a fir-stick, and say, '*Rise up Foul Thief,*' and  
 accordingly the devil used to obey the summons,  
 and appeared in the shape of a raven, a cat, or a dog,  
 and gave responses. The devil instructed him how  
 to be revenged of his enemies; also how to cure and  
 transfer diseases; and further, gave him a spell, by  
 which he killed the Lady Ormestone and her daugh-  
 ter, in revenge of the Lady's having refused him the  
 loan of a mare, and having calling him nicknames.  
*Lastly*, He declared he had many meetings with the  
 devil, *from whom he once got a severe drubbing for*  
*not keeping an appointment.*

*John Neil.*

John Neil was charged with taking off and laying  
 on diseases, the former of which he sometimes effect-  
 ed by making the sick person's shirt be washed in  
 a south-running water. With giving responses con-

\* See the perplexity with which Sir George Mackenzie expresses  
 himself upon the head of *alibi*. Mackenzie's Criminal Trials, tit.  
 22. sect. 3.

† Records of Justiciary, January 32, 1630.

cerning the time and manner of people's death.— 1631  
 With holding consultation with the devil,\* and  
 witches, on Coldinghim Law, how to compass the  
 death of Sir George Home of Manderston. That the  
 result of their deliberation was the getting *an en-*  
*chanted dead foal* and putting it in Sir George's stable,  
 under his stoned-horse's manger; also *a dead hand en-*  
*chanted by the devil*, which they put in Sir George's  
 garden; and that by these means he contracted a  
 grievous disease, of which he could not be recovered,  
 till the dead foal and dead hand were discovered and  
 burned. No pleading, no deposition of witnesses,  
 no confession of the prisoner is recorded; but the  
 jury found the usual verdict; and the usual sentence  
 was pronounced by the Court.

*Janet Brown, and others.*

An act and commission of parliament was passed 1649  
 on the 12th of July, and another on the 7th of Aug-  
 ust, 1649, constituting Sir James Melville of Raith,  
 Alexander Orrock of Orrock, Robert Aytoun of Inch-  
 darnie, and certain baillies of Burntisland, judges,  
 with powers to try certain persons for the crime of  
 witchcraft. Janet Brown was first brought before  
 them. She was charged in the indictment with hav-  
 ing held 'a meeting with the devil appearing as a  
 'man, at the back of Broomhills, who was *at a*  
 'wanton play with Isobel Gairdner, elder, and Janet  
 'Thomson; and he vanished away like a whirlwind.†  
 —With having there renounced her baptism, upon

\* Rec. of Just. March 26th, 1631.

† Original MSS. in possession of Major Melville of Murdach-  
 cairnie.

1649 which the devil *sealed her as one of his*, by a mark on the right arm, into which *Mr. James Wilson, minister of Dysart, in presence of Mr. John Chalmers,\* minister at Auchterderran, thrust a long pin of wire into the head, and she was insensible of it.* And the like experiment was tried in presence of Mr. Dalgliesh, minister at Cramond, &c. The prisoner, and two other women, were convicted, condemned, and executed, in one day.

Within a few days after, other three miserable women arrived at the last stage of a common journey in those days of superstitious ignorance,† viz. from the parson of the parish to the criminal judges, and from the criminal judges to the executioner. They were arraigned before the same tribunal, on the hacknied charge of meeting with the devil. One of them, Isobel Bairdie, was accused of taking up a *stoup*, i. e. a flaggon, and drank, ‘and the devil drank to her, and she pledging him, drank back again to him, and he pledged her, saying, ‘*Grammercie, you are very welcome.*’ In each of the three indictments, it is added, that the prisoner had confessed, in presence of several ministers, baillies, and elders. And it appears from the verdict of the jury, that these inquisitors were produced before the Court, to prove the *extrajudicial confessions* of the miserable prisoners, who had already been harassed, perhaps out of their senses, or rendered

\* Two of these reverend inquisitors, Wilson and Dalgliesh, were turned out of their churches, A. D. 1663, for not submitting to the act of parliament re-establishing Prelacy.

† Wodrow's History of the Sufferings of the Church, vol. 1. Appendix, No. 37.

weary of life, by the persecutions of brutish ignorance, and diabolical cruelty. 1649

The jury found the prisoners ' guilty of the said crime of witchcraft, and that they deserve to die therefore, *but referring the manner of their death, and time and place of their execution to the said judges their determination.*'\* The judges ordained them to be taken that same afternoon to the place of execution, at the and there to be strangled at a stake and burned.

### *Major Weir.*

The noted Major Weir, who was accused of having exceeded the common depravity of mankind, was dreaded for his sorceries, and admired for his gift of prayer. He *confessed crimes that it was possible for him to have committed*, as well as the absurd imputation of witchcraft. Yet he qualified his confession by answering to the articles of the indictment, ' *that he thought himself guilty of the foresaid crimes, and could not deny them.*'† The Lord Advocate then led a distinct proof of his extrajudicial confession, which was marked with circumstances that convince me he was in many respects acknowledging the truth. Indeed his sister swears to his guilt in one of the articles *libelled*. I must observe, at the same time, that one of the witnesses to his confession was the minister of Ormestone, who swore that the Major had sent for the witness to prison, *in order to confess his sins to him, which con-*

\* In these trials mention is made of several wizards and witches who had lately suffered at Aberdour.

† Rec. of Just. April 9, 1670.

1670 *session the minister gave in evidence\* against him when tried for his life: and that I am convinced of the prisoner's having been delirious at the time of his trial. I decline publishing the particulars of this case.†*

*Isobel Elliot, and nine other women.*

1678 *Isobel Elliot and nine other women were tried for witchcraft in one day. The articles of indictment against all of them were pretty much the same. Those exhibited against Isobel Elliot were as follow:‡ that about two years ago she staid at home from the kirk at the desire of her mistress, who was a witch, when the devil had a meeting with the prisoner, her mistress, and two other witches; that he kissed the prisoner, baptised her on the face with an waff of his hand like a dewing, and offered to lie with her, but forbore because she was with child;*

\* In countries where the Roman Catholic religion is professed, the priest who betrays what is communicated to him in confession is (I am told) burned alive. When the Reformed clergy renounced the *errors of Popery*, they were too wise to reject, in practice, so powerful an instrument in the hands of the priesthood, as auricular confession. I leave it to casuists in religion to determine as to the efficacy of auricular confession in the *salvation of the soul*; but I cannot help thinking, that for a priest to reveal this confession in a criminal court, to the *destruction of the body*, deserves to be placed nigh the top of the scale of human depravity.

† So great was the horror entertained for Major Weir, so general was the belief that his house was possessed by devils, that almost for a hundred years no person would inhabit it. At this minute it is not occupied as a dwelling-house, but as a smith and woolcomber's shop.

‡ Records of Justiciary, Sept. 13, 1678.

that after she was *kirked* the devil often met her, 1678 and had *carnal copulation* with her. The prisoner and the other nine miserable women underwent all the legal forms incident to their unhappy situation among that deluded and barbarous people. They had been prosecuted by his Majesty's Advocate; they judicially acknowledged their guilt, were convicted by the jury, condemned by the judges, and burned by the executioner,—*for having had carnal copulation with the devil.*

*Impostor of Bargarran.*

Some years after, an impostor appeared, in the character of a person tormented by witches, Christian Shaw, daughter of John Shaw of Bargarran, a gentleman of some note in the county of Renfrew. She is said to have been but eleven years of age. And although it is probable that hysterical affections may in part have occasioned her rhapsodies to proceed from real illusion, as well as accounted for the contortions which agitated her body; yet she seems to have displayed an artifice above her years, an address superior to her situation, and to have been aided by accomplices, which dulness of apprehension, or violence of prejudice, forbade the by-standers to discover. 1697

This actress was abundantly pert and lively; and her challenging one of the house-maids for drinking, perhaps for stealing, a little milk, which drew on her an angry retort, was the simple prelude to a complicated and wonderful scene of artifice and delusion, of fanaticism and barbarity.

1697 In the month of August, 1696,\* within a few days after her quarrel with the house-maid, the girl was seized with hysterical convulsions, which in repeated fits displayed that variety of symptoms which characterise this capricious disease. To these, other appearances were speedily added, which could only be attributed to supernatural influence, or to fraud and imposition. She put out of her mouth quantities of egg-shells, orange-pill, feathers of wild, and bones of tame fowl, hair of various colours, hot coal-cinders, straws, crooked pins, &c.

Having by those sensible objects impressed the public with the most complete and fearful conviction of her being ‘grievously vexed† with a devil,’ she found herself capable to command the implicit assent of the spectators, in matters that were repugnant to the evidence of their own senses. For this purpose, she fell upon the device of seeming to possess the faculties of seeing and hearing, in a manner opposite to that of the rest of mankind. She would address some invisible beings as if actually present; at other times, in her conversations with those invisible beings, she would rail at them for telling her that persons actually present were in the room; protesting that she did not see them, yet at the same time minutely describing their dress. For instance, she spake as follows to the chief of her alledged tormentors, Catherine Campbell, with whom she had the quarrel, and who, to use the language of those times, was not *discernibly* present: ‘thou sittest with a

\* True narrative of the sufferings and relief of a young girl. Edinburgh, printed by James Watson, 1698.

† St. Matthew, c. 15. v. 22.



‘ stick in thy hand to put into my mouth, but 1697  
 ‘ through God’s strength thou shalt not get leave: ~~~~~  
 ‘ thou art permitted to torment me, but I trust in  
 ‘ God thou shalt never get my life. I’ll let thee see,  
 ‘ *Katie*, there is no repentance in hell. O what ail-  
 ‘ ed thee to be a witch! Thou sayest it is but three  
 ‘ nights since thou wast a witch. O, if thou would’st  
 ‘ repent, it may be God might give thee repentance,  
 ‘ if thou would’st seek it, and *confess*; if thou would  
 ‘ desire me, I would do what I could; for the devil,  
 ‘ is an ill master to serve,’ &c. &c. After that, she  
 took up her bible, read passages, and expounded  
 them; and, upon one’s offering to take it from her,  
 she shrieked horribly, exclaiming, ‘ She would keep  
 ‘ her bible in spite of all the devils in hell!’ Then  
 she fought, and kicked, and writhed herself, as if  
 struggling with some invisible tormentor. When  
 the sheriff-depute of the county, accompanied by a  
 macer of Justiciary, came to apprehend some of the  
 persons whom her diabolical malice had accused,  
 and were actually in her presence, she addressed an  
 imaginary and invisible correspondent thus: ‘ Is the  
 ‘ sheriff come? Is he near me?’ (Then stretching  
 forth her hand, as if to grope, and the sheriff put-  
 ting his hand into hers she proceeded:) ‘ *I cannot*  
 ‘ *feel the sheriff*. How can he be present here? or  
 ‘ how can I have him by the hand, as thou sayest,  
 ‘ seeing I feel it not? Thou sayest he has brown  
 ‘ coloured cloaths, red plush breeches, with black  
 ‘ stripes, flowered muslin cravat, and an embroid-  
 ‘ ed sword-belt: thou sayest there is an old gray-hair-  
 ‘ ed man with him, having a ring upon his hand; but  
 ‘ I can neither see nor feel any of them. What *are*

1697 ' *they come to apprehend the gentlewoman?* Is this  
 ' their errand indeed?'

These reiterated and awful exercises of the dominion of Satan (for such they were universally deemed) impressed all ranks with amazement and terror. The clergy, as was their duty, were the foremost to embrace the cause of a disciple that was engaged in *more than spiritual warfare* with the grand enemy. Clergymen, by rotation, attended the afflicted damsel, to assist the minister of the parish, the family of Bargarran, and other pious Christians, in the expiatory offices of fasting and prayer. A public fast was ordained by authority of the presbytery. Three popular clergymen successively harangued the trembling audience; and one of them chose for his theme this awful text, ' Woe to the inhabitants of ' the earth and of the sea, for the devil is come ' down unto you, having great wrath, because he ' knoweth he hath but a short time. *And when the ' dragon saw that he was cast down unto the earth, he ' persecuted the woman.*'\* And the prayers and exhortations of the church were speedily seconded with the weight of the secular arm.

On the 19th of January, a warrant of Privy Council was issued,† which set forth, that there were pregnant grounds of suspicion of witchcraft in the shire of Renfrew, especially from the afflicted and extraordinary condition of Christian Shaw, daughter of John Shaw of Bargarran. It therefore granted commission to Alexander Lord Blantyre, Sir John

\* Revelations, chap. 12.

† Records of Privy Council, January 19, March 9, April 5, 1697.

Maxwell of Pollock, Sir John Shaw of Greenock, 1697  
 William Cunnyngnam of Craigens, Alexander Porterfield of Duchall, — Caldwell of Glanderstoun, Gavin Cochrane of Thornlymuir, Alexander Porterfield of Fullwood, and Robert Semple, sheriff-depute of Renfrew, or any five of them, to interrogate and imprison persons suspected of witchcraft, to examine witnesses, &c. but not upon oath, and to transmit their report before the 10th of March. The act of Privy Council is subscribed thus, ‘Pol-  
 ‘warth *Cancellar*. Argyle, Levan, Forfar, Raith,  
 ‘Belhaven, Ja. Steuart, J. Hope, W. Anstruther,  
 ‘J. Maxwell, Ro. Sinclair.’

In the report which was presented on the 9th of March, the commissioners represented that there were *twenty-four persons male and female suspected and accused of witchcraft*, and that further inquiry ought to be made into this crime. Among these unhappy objects of suspicion, it is to be remarked, that there was *a girl of fourteen, and a boy not twelve years of age*. Agreeable to this report a new warrant was issued by the Privy Council to most of the commissioners formerly named, with the addition of Lord Hallcraig, Mr. Francis Montgomery of Giffin, Sir John Houstoun of that ilk, Mr. John Kincaid of Corsbasket, Advocate, and Mr. John Stewart, younger of Blinkhall, Advocate, or any five of them, to meet at Renfrew, Paisley, or Glasgow, to take trial of, *judge, and do justice* upon the foresaid persons; and to sentence the guilty *to be burned or otherwise executed to death*, as the commissioners should incline. It further ordained the commissioners to transmit to the Court of Justiciary an authentic extract of their

1697 proceedings, to be entered upon its records; and contained a recommendation to the Lords of the Treasury to defray the expences of the trial. The act is subscribed, ‘Polwarth *Cancellor*. Douglass, ‘Lauderdale, Annandale, Yester, Kintore, Carmichael, W. Anstruther, Arch. Mure.’

The commissioners, thus empowered, were not remiss in acting under the authority delegated to them. After twenty hours were spent in the examination of witnesses, who gave testimony that the *malefices*\* libelled could not have proceeded from natural causes, and that the prisoners were the authors of these malefices—after five of the unhappy prisoners confessed their own guilt, and criminated their alleged associates—after counsel had been heard on both sides, and the counsel for the prosecution had declared, that, ‘he would not press the jury with ‘the *ordinary severity* of threatening an *assize of error*:† but recommended to them to proceed according to the evidence; and loudly declared to them, that although they ought to beware of condemning the innocent, yet if they should acquit the prisoners, in opposition to legal evidence, ‘they would be accessory to all the blasphemies, apostacies, murders, tortures, and seductions, whereof these enemies of heaven and earth should hereafter be guilty.’ After the jury had spent six hours in deliberation, seven of

\* *Malefice* in the Scots law signifies an act or effect of witchcraft.

† This was an oblique and most scandalous menace. *Assizes of Error* were declared a grievance by the Estates of Parliament at the Revolution.

those miserable persons were condemned to the flames.\* 1697

These instances afford a sufficient specimen of the mode of prosecution against the multitude of miserable persons who were sacrificed at the altar of the Fatal Sisters—Ignorance, Superstition, and Cruelty. But it is impossible to form an estimate of the number of the victims. For not only the Lords of Justiciary, but baillies of regalities, sheriffs of counties, and the endless tribe of commissioners appointed by the Privy Council,† and sometimes by Parliament, officiated as the priests who dragged the victims to the altar.

The time however fast approached, when these human sacrifices were to be abolished. The last person who was prosecuted before the Lords of Justiciary for witchcraft was *Elspeth Rule*, who was tried before Lord Anstruther at the Dumfries circuit, on the 3d of May, 1709.‡ No special act of witchcraft was charged against her; the indictment was of a very general nature, that the prisoner was *habit and*

\* The order of Privy Council for recording the Commissioners proceedings in the books of Justiciary was not complied with.—I am therefore unable to give any further particulars of the catastrophe of those miserable persons, or of the criminal absurdity of those who committed them to the flames.

† For some time after the Restoration, the records of Privy Council are in a manner engrossed with commissions to take trial of witches. There is an instance of the Council, at one sederunt, granting *fourteen separate commissions to take trial of witches*.—Records of Privy Council, Nov. 7, 1661. Jan. 23, 1662.

‡ Records of Circuit Court of Justiciary, holden at Dumfries, May 3, 1709.

1709 *repute*\* (that is, generally holden and deemed) a witch; and that she had used threatening expressions against persons at enmity with her, who were afterwards visited with the loss of cattle, or the death of friends, and one of whom run mad. The jury, by a majority of voices, found these articles proved, and the Judge ordained the prisoner to be burned on the cheek, and to be banished Scotland for life.—The last person who was brought to the stake in Scotland for the crime of witchcraft was condemned by Captain David Ross of Little Daan,† sheriff-depute of Sutherland, A. D. 1722.

Besides, in the sufferings, and tragical end of the persons already specified, human ingenuity seems to have been exhausted in devising variety of torment, against other persons who lay under the suspicion of witchcraft, and who persisted with astonishing for-

\* *Habit and repute* is a very dangerous doctrine of the law of Scotland, at this minute in full force, by which a man may be hanged although hardly any charge be exhibited against him, but that he has a bad character.—For instance, if a man is charged with stealing a pair of old shoes, value threepence, and with being *habit and repute* a thief, if the jury find such indictment proved, or such prisoner guilty, the Court would by law be bound to sentence the prisoner to be hanged;—if my temerity may be pardoned, for supposing that any such thing exists as a precise established rule of criminal law in Scotland.

† It is no small disappointment to me that I cannot lay this trial before the reader. The Sheriff Court Books of the County of Sutherland were carried off by the Sheriff Clerk about fifty years ago. I am somewhat however consoled for my disappointment, by the politeness shewn me by James Traill, Esq. of Hobbister, Advocate, Sheriff-depute of Caithness and Sutherland, who was so obliging at to make a laborious but ineffectual search to recover the books.

itude, in denying the absurd imputation, even when urged with the sharpest tortures. 1709

From the universal and excessive abhorrence entertained at a witch, a suspicion of that crime, independent of judicial severities,\* was sufficient to render the unhappy object anxious for death.—Thrusting of pins into the flesh, and keeping the accused from sleep, were the *ordinary* treatment of a witch. But if the prisoner was endued with uncommon fortitude, other methods were used to extort confession. *The boots, the caspie-claws, and the pilnie-winks*, engines for torturing the legs, the arms, and the fingers, were applied to either sex; and that with such violence, that sometimes the blood would have spouted from the limbs. Loading with heavy irons, and whipping with cords, till the skin and flesh were torn from the bones, have also been the adopted methods of torment.

The bloody zeal of those inquisitors attained to a refinement in cruelty so shocking to humanity,† and so repugnant to justice, as to be almost incredible.

\* Mackenzie's Criminal Trials, tit. *Witchcraft*.

† Records of Justiciary, June 4, 1596. When Alison Balfour was accused of witchcraft, she was put in the caspie-claws, where she was kept forty-eight hours; her husband was put in heavy irons, *her son put in the boots, where he suffered fifty-seven strokes*, and her little daughter, of about seven years of age, put in the pilnie-winks, in her presence, in order to make her confess. She did confess. She retracted her confession in the course of the trial; and publicly, at her execution, declared that the confession was extorted from her by the torments. The mode of tormenting and executing those miserable women is further illustrated by the authentic account of the expence of burning a witch at Burncastle, near Lauder, A. D. 1649, an original paper, published in Appendix, No. 6.

1709 Not satisfied with torturing the person of the accused, their ingenious malice assailed the more delicate feelings, and ardent affections of *the mind*. An aged husband, an infant daughter, would have been tortured in presence of the accused, in order to subdue her resolution. Nay, death itself† did not screen the remains of those miserable persons from the malice of their prosecutors. If an unfortunate woman, trembling at a citation for witchcraft, ended her sufferings by her own hands, she was dragged from her house at a horse's tail, and buried under the gallows.

Locke had written upon government, Fletcher had been a patriot statesman, Bolingbroke had been a Minister in the Augustan age of Queen Anne, ere this system of legal murder and torture was abolished. This was an honour which the tardy humanity of their countrymen reserved, *almost to the middle of the present century,\* for Mr. Conduit, Alderman Heathcote, and Mr. Crosse*. These gentlemen brought a bill into the House of Commons, which was passed into a law, repealing the former statutes against witchcraft, Scots as well as English, and discharging prosecutions for that crime, or for accusing others of that offence.† On the enactment of this statute vanished all those imaginary powers, so absurdly attributed to women oppressed with age and poverty.

While we reflect upon the blind and barbarous superstition of our ancestors, while we bestow the tribute of applause on those humane and liberal se-

† Fountainhall's Decisions, vol. I. p. 60. October 9, 1679.

\* Till A. D. 1735.

† Journals of the House of Commons, Jan. 22, 1735. Geo. II. ann. 2no, c. 5to.



1709



nators who introduced this law, we cannot help lamenting that a sect among us looks upon the abolition of the penal statutes against witchcraft, not only as an evil, but a sin.—The *Sceders* published an act of their associated presbytery at Edinburgh, A. D. 1743. This act, which is full of the most illiberal and absurd doctrines, the most seditious and intolerant spirit, was reprinted at Glasgow so late as the year 1766. In it there is contained *the annual confession of sins*, which to this day they read from the pulpit. Among the sins *national and personal* there confessed, are the act of Queen Anne's Parliament for tolerating the Episcopal religion in Scotland, the act for adjourning the Court of Session during the Christmas holidays; ‘*as also the penal statutes against*’ *witches have been repealed by Parliament, contrary to the express law of God.*’\* The *Sceders* comprehend a very large body of the populace in Scotland. Their zeal for the renewal of the Covenant, their intolerant spirit, are either not attended to by those who have been exerting their endeavours to arm our populace, *or those advocates for a militia* little know to what important and dangerous purposes religious zeal may be applied.

It is well deserving of remark, that the same sect which is railing at patronages, and preaching up the renewal of the *Solemn League and Covenant*, should display the most rancorous spirit of opposition to the repeal of the penal laws *against Popery and against witchcraft*.

\* Act for renewing the Covenants, p. 26, 27, 34.

## CONCLUSION.

These pages, while they state facts deeply interesting, they at the same time give a melancholy display of human nature. If they present us with the *outrageous crimes of the prisoners*, they also exhibit what is much more shocking, *the legal murders of the Court*. Let us inquire whence proceeded a system of penal law, so repugnant to justice, humanity, and policy; and draw the important conclusion.

*The want of Science, and of Civil Liberty*, is the fundamental source of those proceedings, where Tyranny and Superstition, masked in the solemn garb of Law and Justice, stride horrible, with all their ghastly train, of confiscation, torture, and murder: On the want of Science has been erected the monstrous fabric of Superstition. The want of Civil Liberty has enabled tyrants to sport with the most sacred rights—the most tender feelings of mankind. Tyranny and Superstition dictated the barbarous laws, which have brought so many innocent persons to an ignominious death. And the same want of Science, and of Liberty, which gave occasion to the enactment of sanguinary laws, introduced carelessness into the forms of judicial proceedings, and injustice in the measure of legal evidence.


Beyond all her other qualifications, then, let Science be revered as an antidote to Superstition, as a friend to Civil Liberty, and as *the true Philosopher's Stone*, which in an arbitrary Government transmutes the iron rod of a Tyrant into the golden sceptre of a King, the Father of his People.

# APPENDIX.

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## No. I.

*Supersedere, or personal protection from arrest\*, granted to  
John Earl of Gowrie, June 20th, 1600.*

**R**EGE presente.—Sederunt Domini Sessionis, Montros Can- 1600  
cellarius, Secretarius, Tungland, Halyrudhous, Cranstoun,   
Ridell, Kinlos Edzall, Clericus Registri, Clericus Justiciarii,  
Advocatus, Quhittinghame, Maircairny, Privie Seill, Fyvie  
preses, Dunkeld, Thesaurarius, Blantyre, Fenton Barnis una  
cum, &c.

Our Sovereign Lord understanding that the time of the  
exercise of the office of Thesaurary by umquhille William Earl  
of Gowrie, Lord Ruthven and Dirleton, he was forced for the  
honourable defray of his Highness maist necessary affairs  
touching the weal of this realm, and honour of his Highness  
crown, to burthen himself and his house with great summs of  
money; and that at the fitting of his last accounts made of  
his intromissions with the said office of Thesaurary upon the  
10th day of May, the year of God 1583 years, he was found  
super-expended in the sum of £48,063 : 4 : 8, as the said  
compt bears; and that albeit at the end and conclusion of the  
said compt, his Highness specially ordained that the said um-  
quhille Earl should noways have been troubled, or charged  
with the payment of any allowances taken by him in his said  
compts, unto the time he had been first compleatly paid of the  
sai'd allowances and super-expences by his Highness, yet our  
sovereign Lord understanding that since his decease, John,  
now Earl of Gowrie, Lord Ruthven and Dirleton, his son,

\* Till the Union, the Scots Peers were liable to be arrested for  
debt.

1600 has already payed many summs of money to the persons whom  
 ~~~~~ for his said umquhile father took the saids allowances, albeit  
 our sovereign Lord as yet has made no payment to him, nor
 to his said umquhile father, of the saids super-expences, and
 that it is not possible to the said Earl of Gowrie to make any
 further payment to his said umquhile father's creditors, whom
 for he took the saids allowances, except an certain space and
 time be granted to him to that effect; therefor, our said sove-
 reign Lord, with express advice, counsal, and deliberation, of
 the Lords and Senators of his Highness's Session and College
 of Justice, by these presents, decerns, declares, and ordains,
 that the said John, now Earl of Gowrie, shall nowise be called,
 pursued, charged, nor burthened, with the payment of what-
 soever his umquihil father's debts, whereof he took allow-
 ance in any of his compts of Thesaurary, for the space of an
 year next to come after the date hereof; that in the mean
 time his Highness may see the said Earl satisfied of the said
 super-expences resting by his Majesty to his said umquhile fa-
 ther; and to this effect discharges the Clerk of Register, and
 his deputes, of all extracting, or giving furth of any extracts
 of the saids allowances taken by the said umquhille Earl during
 his said office of Thesaurary to whatsoever persons. And
 also; the saids Lords and Senators of the College of Justice
 declares that they will nowise grant nor direct any letters nor
 charges whatsoever, at the instance of whatsoever party,
 against the said John, now Earl of Gowrie, his cautioners or
 tenants, upon whatsoever decreets, already recovered, or to
 be recovered against them, for payment of any of the saids al-
 lowances for the said space of an year next to come; and in
 the mean time suspends all letters of horning, pointing, cap-
 tion, inhibition, and others whatsoever letters, with all ar-
 restments, effect and execution thereof, used or to be used
 against the said John, now Earl of Gowrie, his cautioners or
 tenants, during the foresaid space; and ordains letters to be
 direct foresaid in form, as effeirs*.

* MS. Acts of Sederunt, vol. 4. June 20th, 1600.

No. II.

Excerpts from the 'Summondis of Treassoun' against Robert Logane, eldest sone to Robert Logane, sumtyme of Restalrig, and his tutors and curators, on account of the said deceased Robert Logane's accession to the E. of Gowrie's conspiracy.

Cujus proditiōnis quamvis nos dictum quondam Robertum 1600
Logane de Restalrig reum esse ignoraremus, ipse tamen sua
damnatus conscientia, ac semper timens ne dictus quondam Ja-
cobus Bour Dicte conjurationis conscius rem omnem detege-
ret, sepius cum dicto Jacobo egit, ut fidem sibi de ea proditi-
one celanda obstringerit, tandemque per dictum Jacobum
certior factus quondam Georgium Sprott notarium in Ay-
mouth, tum visis ipsius quondam Roberti ad dictum quond.
Comitem de Gowrie, ea de re literis scriptis apud Gwnisgrene,
priusquam clause fuissent pluribus diebus ante patratum scelus,
et post detectam conjurationem (quod dictus quond. Jacobus
Boure literarum prorsus ignarus dicti quondam Georgii opera
in legendis scriptis omnibus ad eum missis vel pertinentibus
utebatur) quasdam etiam dicti quond. Roberti literis super
ea conjuratione apud dictum Jacobum Boure fortuito vidisse,
quas a dicto quondam Comite de Gowrie, postquam eas leg-
isset ad dictum Robertum Logane reportandas, dictus quon-
dam Jacobus Boure retinuerat, sicque conjurationis perfectam
notitiam habere ejusdem dictum quondam Robertum conscium
esse, et participem intelligere Dictus quondam Robertus Lo-
gane de Restalrig, cum utroque diligentissime egit, multisque
unicuique eorum datus muneribus persuasit, ut dictam proditi-
onem pro perpetuo celarent, obtinuitque, ut se vivo nun-
quam revelaretur, neque prius horrendam illud dicti Roberti
Majestatis crimen detectum fuit, quam dictus quondam Geo-
rgius Sprott divino, ut apparuit, inspirante numine, ad vindi-
candam nostram ab improborum calumniis famam, predictam
proditoriam conjurationem et dicti quondam Roberti Logane

1600 ejusdem reatum multis constantissime confessionibus ultro
 ~~~~~ patefecit, et dicti quondam Roberti literis quas a dicto quon-  
 dam Jacobo Boure acceperat, prolatis, manifestavit, ac con-  
 stanti pia et penitenti\* ob tam horrendum facinus tam diu  
 celatum morte feliciter confirmavit,' &c.

### No. III.


*Trial of Thomas Scott, Henry Yair, &c. for treasonably ris-  
 ing in arms, and keeping her Majesty a prisoner, on the  
 night that Riccio was murdered.*

I discovered the papers in this appendix, and in the two following numbers, after this work was mostly printed. They are not original; but there is every reason to believe that they are authentic copies; and, as the original Records of Justiciary for the periods to which these papers relate are missing, I have thought them entitled to a place in this work. They are taken from a volume of manuscripts in the Advocates' Library, collected by Sir Lewis Stewart of Kirkhill. Sir Lewis was a lawyer of the first eminence in the reign of Charles I. and a man of elegant and cultivated genius. Robert Burnet, Lord Crimond, who was appointed one of the Senators of the College of Justice at the Restoration, in his preface to *Craig de Feudis*, expresses himself thus of Sir Lewis: 'Quo, nemo acutius, tersius, concinnius, et majore cum fide unquam ac-  
 'tavit causas.' Sir Lewis Stewart's daughter and heiress was married to Henry third Lord Cardross; and of this marriage the present Earl of Buchan and his brothers are descended.

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1566 Curia tent primo Aprilis 1566, per Magistrum Thomam  
 ~~~~~ Craig Justiciarium-deputatum, nobilis et potentis Dni Archi-  
 baldi Comitis Ergadie, Dni Campbell et Lorne, Justiciarii

* Register of Parliament, June 24th, 1609.

Generalis, S. D. N. regis, et Regine prescript. sēctis vocatis et 1566
curia affirmata. 

Intran.

Thomas Scott * of Cambusmichael, sheriff-depute of Perth.

William Harlaw, }
John Mowbray, } Burgesses of Edinburgh.

A S S Y S E.

The Laird of Langtoun, the Laird of Whytelaw, Andro Hamiltoun of Cochna, the Laird of Skirling, Alexander Stewart tutor of Castlemilk, Alexander Home burges of Edinburgh, William Forrester in Leith, Walter Cant ther, Cuthbert Ramsay burges of Edinburgh, William Foulter baillie, James Nicoll baillie, John Hamiltoun merchant, the Laird of Cambusnethan, Alexander Bruce burges of Edinburgh.

William Foulter and James Nicoll baillies protestit, that their passing upon this assyse be na wayes prejudiciall to them nor ther offices in tyme cuming.

The qlke day the said Thomas Scott, Wm Harlaw, and John Mowbray, wer convict and fyllit be the said assyse of airt and pairt of the unlesum and treasonable waching, warding, and halding in captivitie, with convocatione of our soveran Ladyes leiges, bodin in feir of weir, als weill in secreit armour as with jaks, steill bonnetts, gunes, pistolets, swords, bucklers, Jedburgh staffis, halberts, and others wapins invasive, be themselvis, and others in yr names, of yr causeing command, assistance, devysing, sending, and ratihabitone of our said soveran Ladyes maist nobill persone within hir maist secreit chamber of hir pallace of Hallyrudhowse, immediatelie and continuallie fra the comitting of the crewall and treasonable slaughter of umqll secretar David Rizew, qlk wes upon the ninth day of March last, bypast, to the space 48 hours nixt yrafter, treasonable and maist awfullie stoping hir Hienes to

* This Thomas Scott and Henry Yair, were the only persons who suffered for the murder of Riccio. Keith's Hist. p. 334.

1566 use hir libertie in the mean tyme: Lykas, also, she hade bin
 ~ haldin be them in prison as yit, maist treasonable and wickit-
 lie, had not bein that be the provisioun of God, she yrafter
 fred and delyverit hirselfe furth of yr hands in maist sober
 and quiet maner under silence of nyt, and with greyte hasart
 of hir lyfe past to her castell of Dumbar for saifetie thereof;
 and this they did upon set purpose, provisioun, and foirthrowght
 felony, and therfor dome wes given and pronouncit be the
 mouthe of the Dempster of the sd court, at comand of the
 sd Justice-depute, that the sd Thomas should be hangit while
 he were deid, drawin, quarterit, and demaneit, as ane trait-
 our, and all his guidis, moveable and unmoveable, lands, here-
 tags, a-rents, takis, offices, steidings, possessiones, and uthers
 whatsomever, to be forfaitit and escheat to our soverane La-
 dyes use, at her pleasure.*

Henrie Yair † delaittit of Treasone following.

A S S Y S E.

Lawrence Symson burges of Edinburgh, John Gilbert gold-
 smith, Thomas Ewing goldsmyth, Gilbert Scougall, Capt. Ro-
 bert Lawder, Robert Ker mert. in Edinburgh, Alexander
 Haistie ther, John Watson mert. ther, James Forret ther, Ed-
 ward Little mert. ther, William Andersone candlemaker,
 Alexr Bruce in Edinburgh, Allan Dickiesone ther, W^m Rae
 cutler, Robert Eviot in Mrtoun.

* ‘Sir Ludovick Steuart of Kirkhill, Advocate, his Collectiones,
 ‘&c. ex manuscriptis Roberti Mylne.’ MS. Advocates Library,
 p. 74. There is another MS. copy of Sir L. Steuart’s Collection
 in the Advocates Library, but this is by far the most correct.—
 The Records of Justiciary, from 10th May, 1559, to 2d March,
 1568, are missing.

† Henry Yair had been a priest who had renounced the Catho-
 lic religion, and been admitted a retainer of Lord Ruthven’s.
 Keith’s History, p. 334.

The qlke day the said Henry Yair was convict and fyllit 1566 be ane assyse, of airt and part assistance, fortifieing, supplying, ratihabitione, and concealling of the treasonable conspiracie, convocatione, and gaddering of our soveranes leigis, to the number of fyve hundreth persones, boddin in fear of wear, alseweill in secreit armour as with jacks, steill bonnetes, gunes, pistolets, swords, buklers, Jedburgh staves, halberts, and others waipons invasive, and entering therewith treasonable wtin yr Majesties pallice of Hallyruidhous, purposlie to have put violent hands in our soverane Ladyes maist nobill persone, halden and demaneit the samyne at yr pleasure; and sicklyke, to have slane or otherwise demaneit as they thought expedient, the Lords of hir Hienes Secreit Counsall and Sessione, and others hir ministers and officiars being within hir pallace, and in her service for the tyme, and that upon the nyynth day of March last bypast, under silence of night, at aught houres at even, or yrby, it being the tyme of parliat current; and for performing this yr maist wicked and ungodlie purpose, they then maist treasonable rushit and enterit within yr said pallace, tuike the samen at yr own hand, reft the keys theirow fra the porters, closit the yetis, and made themselves as principalls and maisters yrintill, our soverane Lady being for the tyme in her maist secreit chamber yrof att hir quietnes, having na feir nor dreidor of hir subjects, to whom hir Grace at all tymes hade been maist beneficiall, guid, and merciful, and yr maist crewallie, with drawin swords, whingers, bended pistolls, and others wapones invasive, persewit and invaidit umqll secretar David Riccio, hir Hienes famailiar servand, yn in companie within hir Hienes chalmer forsaide, and slew him treasonable and unmercifullie, in presence of our said soverane, and pat violent hands in our soverane Ladyes maist nobill persone, in defence and saiftie off the said umqll David, held, detainit, and pressit, the samen maist awfullie and treasonable, till they had comitit ye said slaughter in hir presence, as said is, hir Majestie being then great with chyld, givean to hir Hienes occasioun, throw dreador and displeasure she consaveit be the sight of the said crewall slaughter, and maner yrof, and be the detain-

1566 ing and thristing of hir awn persone in violent manner, as sd is, to part with hir birth, and immediatelie thereafter seirchit and sought the sds Lords, ministers, and officers, being within the said pallace, to have slaine them, and swa had done, had not bein the pleasure of God they escapit, and swa seeing themselves disappoyntit in yt behalfe through yr evasioun, at yr pleasure, in treasonable maner detainit and held captive the remanent Lords, ministers, and officers within the said pallice, fra the said hour at aught while tua hours after midnight yt samen night, continually, upon set purpose, provisioun, and foirthowght felony.

Item, For airt and pairt of the unlesum and treasonable warding and halding in captivitie, with convocation foresaid, boding in feir of weir, as said is, be himselfe, and uthers his complices, of our soverane Ladyes maist noble persone, within her said chalmer of hir pallice of Halyrudhous forsaid, immediatelie and continuallie frae the committing of the said crewall treasonable slaughter qlke wes at the tyme forsaid, to the space of fourty-aught hours nixt thereafter, treasonable and maist aufullie stoping hir Hienes to use hir libertie in the meanetyme; lykeas alsoe, she had bein halden be them in prisone as yit, had not bein that, be the provision of God, she therfor fled and delyverit herselfe furth of ther hands, in maist sober and quyet maner, under silence of night, and with great hazart of hir lyfe, past to the castell of Dumbar for saiftie of hir lyfe, upon set purpose, provisioun, and foirthought felony: And theirfore domè was given and pronuncit be the mouth of the Dempster of the sd court, att command of the sd Justice Deput, that the sd Hendrie sould be hangit while he were deid, drawin, quarterit, and demaineit, as ane traitor, and all his moveable and unmoveable, lands, heretadges, a-rents, tacks, offices, steidings, possessiouns, and uthers whatsoever, to be forfeitit and escheat to our Soverane, to be used and disponed be hir Majestie at hir pleasure*.

* S. L. Steuart's Collection, p. 75.

In the Appendix to Keith's Historical Collection, the following circumstance is mentioned relative to the murder of Riccio. When Mary reproached Darnley with the audacious insult which had been offered to her, he justified himself by saying, that, since Riccio grew into favour with her Majesty, he (Darnley) was neither regarded, nor entertained, nor trusted by her, in the wonted manner; for before that, she used to come into his chamber, and pass the time with him, which now she had not done of a long while: that when he went in to her majesty's chamber, she generally had Riccio there as a third person, and with whom she used to play at cards, after supper, till one or two in the morning. And he asked what fault he had committed, *what failing had come upon him*, that she treated him with such disdain? The Queen replied, 'That it was not a gentlewoman's duty to come to her husband's chamber, but rather the husband to come to the wife's.' And that for this outrage which he had committed, she should be his wife no longer, nor lie with him any more: nor would she rest contented till he had as sorrowful a heart as she felt at that moment.

On the next night, however, which was Sunday the 10th, the Queen being still a close prisoner in her own palace, had occasion to cajole Darnley; and after long reasoning between them she consented that he should come to her chamber, and pass the night. When he went down stairs, he told the Earl of Morton and Lord Ruthven of what had passed between the Queen and him; he then went to his chamber for a while, and *fell fast asleep!* One of his attendants endeavoured, but in vain, to awake him, and he enjoyed his repose till six in the morning. When Darnley awaked, Lord Ruthven, who had slept in an adjoining chamber, sneeringly asked him, Why he did not keep his promise with the Queen? and understanding that the former meant still to go up to her Majesty's chamber, he said, 'I trust she shall serve you * in the morning, as you did her at night.' Darnley went up however, and

* Keith's Hist. Appendix, p. 123, 128.

1566 being asked by the Queen, What became of him last night?
 he answered, He had fallen *dead asleep*. He then offered
 to lie down beside her, but she declared, that, if he lay down,
 she would instantly get out of bed.

No. IV.

*Confession of the Laird of Ormiston, who was executed for
 the Murder of Darnley.**

At the Castell of Edinburgh, the 13th of Dec. 1573.

1573 The qlke day John Brand minister at Hallyruidhous being
 send to John Ormistounne to give him comfort be the promiss
 of God's word offerit to sinners, and alsua to requyre the said
 laird to glorifie God in shawing of the trewth, &c.; after lang
 conference, and prayers made, aboue the space of ane hour,
 or theirby, the said John Brand minister said unto him, Sir,
 Though I am trewlie perswadit that the haill trewth ye have
 shawen me of this matter, yit, because divers and greater
 doubts are passit of you, and also the memorie of men are
 bot weak, theirfor, gif ye thought guid, I wald certane of
 they things breifeley that you have spoken were wrytten; wha
 answerit meiklie, For God's sake doe the samen; wreit even
 as I shall speike. As I shall answer unto God, with whom I
 hope this night to supe, I shall declaire unto you the haill,
 from the begining unto the end of my pairt. *First*, I con-
 fess that the Earle Bothwell shew the samen wickit deid unto
 me, in his awn chalmer in the Abbey, on Fryday before the
 deid wes done, and requyred me take pairt with him therein,
 because as he alleaged I wes ane man of activeness, (alace
 theirfor!) qre I utterly refusit, and said, God forbid! bot,

* Ormistone's trial is not to be found in the Records of Justi-
 ciary. His trial and execution are mentioned in Spottiswood's
 Hist. p. 271. The particulars of his confession coincide with those
 of John Hay of Talla, and John Hepburn, which are published
 in Anderson's Collections, vol. II. p. 177, 178.

gif it were upon the field, to fight with your Lo. unto the 1573 death, I sould not feir my skinn cutting. Then the said Earle said unto me, Tuishe, Ormistoune, ye need not take feir of this, for the haill Lords has concludit the samen in Craigmiller, all that wes ther with the Quein, and nane darr find falt with it when it shall be done. After the qlk I departit hame to Kaitie's, 'Thomes being some part seik, I lay doun in my bed, and lay all Saturday thereafter for that cause, beleivand that way to have put aff that evil hour; and swa I knew na farder of it untill Sondag at night, q^r I being in chamber in the Blackfrier-wynd, gangand in ane beltit gown, John Hepburne and John Hay of Talla came unto me, and said the Quein's (g.) and Lords are past up to sie the King, and my Lord is standand at the Blackfrier-wynd-fute, and bids you cume to him incontinent; where I laid my gown from me, and tuik ane ryding clock, because I beleivit all had bein weill ahewche now agreit, seing they had pasit up to visit him; and cuming at the first, I mist the said Earle, for he had come in upe anuther close to seik me himselve, in my awn chamber, and y^r he fand my cousing Hob, q^m he brought with him, and y^r after met togidder in the mids of the wynd, wha tuike me againe, and we all pasit upe to the Freier yaird, through the slape, whair Pareis and Archie Betoun comit and met us, and said all wes ready preparit for the setting of the lunt; and they all inquiryrit how it sould be set to; and, after diverse speakings, I said, Take ane piece of lunt of thrie or four inch lang, and kindle the end of it, and lay to the cauld end, and it wald burn syne to the train, and swa will blaw up; after the qlk, the (Q.) grace pasit hame to. The Earle Bothwelle said, Speid, and close all the doores, for they had 13 fals keys of the lodging maide, and givin, as they said to me, be him that aught the house; after the qlke I departit incontinent, and came not nearer, as I shall answer before God, nor the doore; and as I was cuming hame it strake ten hours, wher then I pasit to James Kaitie's hous, to avoid suspitioun, y^t na man sould say I was at the deid doing, for I was an hour and mair in my bed or the blast and crack was. Being inquiryrit be the said minister, gif he knew not y^t the King was uthers-

1573 wayes handlit be mens handes, for it is comonlie spoken he was brought furth and weirreit? Wha anserit, As I sall answer to my God, I knew nothing but he was blawin up; and did inquire the samyn maist dilligentlie at John Hepburne and John Hay, and all that tarreit behind me, wha swore unto me, they never knew nae uther thing bot he was blawin up; and swa I think it was ane work done be God for the punishment of money wickit men, whairof I am ane, and ane great sinner before God, for the qlke I ask God mercy.

Thirdly, Being requyrit, gif he knew na farder hereafter? ansrit, At the pasche yrafter, when the brute began to ryse upon us, and all cryit, ane vengeance upon them that slew the King! it prickit my conscience, and I come to the Earle Bothwell in his chamber, and said to him, What devill is this now, my Lord, yt every body suspectis you of this deid, and cries, ane vengeance for the samen! and few or no uther spoken of bot yow? Aneuther thing yow said to me: Wha ansrit, I sall let you sie sune thing that I had for me; wha then let me sie ane contract subscriyvit be four or fyve hand-writtis whilke he affirmit to me was the subscription of the Earle Huntlie, Argyll secretar, and Sr James Balfour, and alleaged mony mae promisit, wha wald assist, or he were put at; and yrafter read the said contract, qlk, as I remember, conteinit thir words, in effect, That, for samikle it was thought expedient and maist profitable for the commoun wealth, be the haill Nobilitie and Lords undersubscriyvand, that sick ane young fooll and proud tirrane sould not reigne nor bear rule over them; and that for diverse causes; and theirfor, that the haill had concludit that he sould be put off by ane way or uther, and whosoever sould take the deid in hand, to do it, they sould defend and fortifie as themselves, for it sould be everyane's action, recknit and halden done be themselves; whilk writting, as the said Earle shew unto me, was devysit be Sr James Balfour, subscriyvit be them all ane quartur of ane year before the deid was done; after the whilk I never spake to the said Earle of it whill the day he gate his assyse, whaire the said Earle standing at the barr, luiking doun sad lyke, I plukit on him and said, Fye, my Lord! what deivell is this yee are

doeand? Your face shows what ye are: hald up yowr face, for 1573
 God's saike, and luike blythlie; ye might luike swa and you
 were gangand to the deid: Alace! and wo worth them that
 ever devysit it! I trow it sall garr us all murnel—wha ansrit
 me, Had your tongue; I wald not yet it wer toe do: I have
 ane airt gaite fra it, came as it may, and yt ye will knaw be-
 lyve, &c.

Forder, the tyme when my brother was hurt be the Laird
 of Sefford, word came to me first that they wes slane, and
 then yr came ane bill from them, and said they wer onley hurt,
 and wald not die; but ane thing did them more evill then their
 hurting, to witt, that ane commounne bruite was risen, that I
 was at the King's slaughter, and theirfor desirit me to get
 sume guid way to purge myselfe; let it pass na farder, or else
 ye have done with it; qlk bill I tuike and gave to the Earle
 Bothwell, wha tuike it and gave it to the Quein, and she tuike
 it and read it, and gave it to the Earle Huntlie, yr present;
 wha read it, and yrafter turnit unto me, and turnit her back
 and gave creinge with her shoulder, and passit away and spake
 nothing to me. This is the haill thing that I knaw, either
 befor or theirafter, as I shall ansuer to my God, with whom
 I hope to supe. After the qlk being inquiryed, Gife ever the
 Quein spake to me of it at any tyme, or gif he knew what wes
 the Queens mynd into it? ansrit, As I shall ansuer to God
 shoe never spake to me nor I to hir of it, nor I knaw nathing
 of hir part but as my Lord Bothwell shew me; for I will not
 speike bot the trewth for all the gold of the earth, qlk I desyre
 yow, guid minister, bear record hearof as ye have written,
 qlk I pray yow read over to me: Let me also see it; qlk I did
 before Archd Dowglass constabill of the castell, and George
 Towers of Bristo, with uthers divers gentlemen and servants
 being in the chamber; qlk being done, he said, for God's
 saike, sit down and pray for me, for I have bein ane greit
 sinner utherwyse, for the qlk my God this day punishes me;
 for of all men one the earth I have bein ane of the proudest
 and high myndit, and maist filthie of my body, abusing the
 same dyvers wayes, but specially I have shed innocent blood
 of ane Michael Hunter with my own hands; Alace theirfor!

1573 because the said Michael having me lyeing upon my back,
 ~~~~~ haveing ane fork in his hand, myght have slayne me gif he  
 pleasit, and did it not, qlk of all things maist grieves my con-  
 science: Alswa in a raige I hangit a poor man for ane horse;  
 with mony uther wickit deids; for the qlk I aske my God  
 mercy, for its not mervell I have bein wickit, for the wickit  
 companie that ever I have bein in, bot specialle within thir  
 seaven years bypast, qlk I never saw twa guid men or ane  
 guid deid, bot all kind of wickedness; and yit my God wald  
 not suffer me to be lost, and hes drawn me from them as  
 out of hell, and hes given me leasur and space, with guid com-  
 panie, to repent, for the qlk I thank him, *and is assurit that  
 I am ane of his elect, &c.*

• Thir words, with mony mae, cryand continually unto his  
 God even to the very end, cryand, My Lord Jesus! Sweit  
 Jesus, have mercy upon me, as you have had upon uther sin-  
 ners! in sick sort, yt he was, to the appearance of man, ane  
 of the maist penitent sinners that hes been sein this lang tyme,  
 and may be comptit ane example of God's mercies to all pe-  
 netent sinners.\*

• The authentick coppie of this I receaved fram Mr. Rid  
 Skene, sone to umq<sup>ll</sup> Mr. John Skene, sune tyme clerk of  
 counsall, whilke wes amang his umq<sup>ll</sup> father's papers.

#### No. V.

#### *Trial of the Earl of Mortoun, for the Murder of Darnley.*

• Mortoun his forfaltrie.

1581 Curia Justiciarie S. D. N. regis tenta et inchoata in preto-  
 ~~~~~ rio burgi de Edinburgh, primo die mensis Junii, anno Dni  
 millesimo quingentesimo octuagesimo primo, per honorabiles
 et discretos viros Jacobum Striviling de Keir militem, et ma-
 gistrum Joannem Grahame justiciarios in hac parte per com-
 missionem S. D. N. regis, ac Dnorum ejus secreti concilii spe-
 cialiter constitut, ad effectum subscriptum sectis vocatis, et cu-
 ria legitime affirmata, &c.

* S. L. Stuart's Coll. p. 72,

Jacobus Comes de Mortoun, Dns de Dalkeith, &c. accusatus callumniatus de arte, parte, prescientia, conselatione, et non releuatione proditorie murthure quondam nobilissimi et charissimi Henrici regis Scotorum, patris S. D. N. Regis Jacobi sexti. 1581

Nomina assisae elect jurat et admiss super prefato Jacobo Comite de Mortoun, &c. viz.

Colinus Comes Ergadie, Joannes Comes de Montrois, Andreas Comes de Rothies, Jacobus Comes de Glencairne, Hugo Comes de Eglintoun, Alexander Comes de Sutherland, Joannes Dns de Maxwell, Georgius Dns de Seytoun, Jacobus Dns Ogilvie, Jacobus Dns Innermaithe, Hugo Dns Somervell, Alexander Magister de Levingstoun, Alexander Mr de Elphingstoun, Joannes Gordoun de Lochinvar, Miles, Patricius Hepburne de Wachtoun, Patricius Learmonth de Dersie, Miles, Willielmus Livingstoun de Kilsyth, Miles.

The whilk day the said James Earle of Mortoun being indyttit and accusit, that, in the moneths of Januarii and Februi, in the yeir of God 1566 yeiris, he, accompaniit with James, some tyme Earle Bothwell, James Ormistoun some tyme of that Ilke, Robert, *alias* Hob Ormistoun, his father brother, John Hay some tyme of Tallo, younger, John Hepburne, callit John of Bowtoun, and divers others his complices, craftelie and secretlie conspirit among them selves, consultit, treatit, devysit, and maliciously concludit the maist shameful, detestable, and unnatural murther and patricide of our soverane Lords umqll dearest father, Henry King of Scotts, lawfull spouse for the tyme to his Hienes's dearest mother, Mary, then Quein of Scotland, and that within the burgh of Edr, pallice of Hallyruidhouse, and uthers places therabout; and to the end he myght bring his wicked, filthie, and execrabil attempt at better to pass, he with the remanent persouns afoirnamed, be themselves, y^r servants, complices, and others, in y^r names, of their cawseing command, hounding, sending, partaking, assistance and ratihabitione, upon the tenth day of the sd moneth of Feberwar 1566 years, at twa hours after midnight, or therby, come to the lodgeing besyde the Kirk of

1581 Feild, within the said burgh of Edr, wher our sd soverane
 Lords umqll dearest father was lodgit for the tyme, and ther
 be way of hamesukin, brigancie, and foirthrowght felonie,
 maist vylelie, unmercifullie, and treasonable, slew and mur-
 therit him, with Wm Tayliour and Andro Makage, his cubi-
 tularis, when as they, buriat in slep, were takeand the nyghts
 rest, brunt his haill lodgeing forsaid, and raised the samen in
 the aire be force of gun poulder, qlke a lytle afore was placit
 and imput be him and his forsaid under the grund, and angu-
 lar stands, and within the voltis, laich and derne pairts and
 and places yrof, to that effect, and richt, swa he with the re-
 manent persouns afornameit, marrowis of his mischeife, be
 themselves, yr servants, complices, and uthers, in yr names,
 of their causing, command, hunding, sending, and airt and
 pertaking, assistance, and ratihabition, at the tymes forsaid,
 respective, gave their favor, counsall, and help to the perpe-
 tration of the said horrible crymes, and ay sinsyne hes simu-
 late, hid, and conceillit the samen, in maist treasonable and
 secreit maner, and theirthrow had incurrit the paines of leis-
 magestie, and sould have bein punishit theirfor with all ri-
 gour, be tinsall of life, lands, and guidis, and be extinctioun
 of fame, honour, titles, and memorie, conform to the lawis
 of this realme; lykeas the remanent persouns afoirnamed, his
 complices and conspirators with him in their treasonable impi-
 eties, were already tryed and forfaultit for the self same hy-
 nous and detestable crymes, and for the maist part, as they
 could be apprehendit, had sufferit maist shameful deid theirfor,
 according to yr deserving, as at mair lenth is contained in the
 dittay given in anent the premisses, with the talkins and proba-
 tiouns productit and usit theirwith; qlks being read, the said James
 Earle of Mortoun, and he anserand yro, denyit the samen, be
 reasoun whereof the said Justice deputis referrit the samen to
 the knowledge of the inqueist and assyse above written, wha
 wes resavit and admittit in presence of the said Earle, and they
 being furth of court removed, and ryply advisit with the said
 dittay, talkins infallible and maist evident, with the probatiouns
 productit and usit for verififying theirrof, and yrafter inenterand

again in court, they all in ane voyce, be the pronunceing of 1581
the mouth of John Earle of Montrose, chancellor choisen be
the sd assyse, fyllit the said James Earle of Mortoun of airt,
pairt, foirknowledge, and conceiling of the treasonable and un-
natural murthers forsaid; after the qlke conviction, the saids
Justice-deputis, be pronouncioun of Andro Lindsay, Dem-
ster of the said court, adjudgit, and for dome * gave, that the
said James Earle of Mortoun sould be had to ane gibbet be-
syde the mercat-crose of the sd burgh of Edr, and ther be
hangit while he be deid, and yrafter drawin, quarterit, and de-
maneit, as ane traitour; and that all his lands, heretage, of-
fices, possessiones, tackes, steadings, cornes, cattell, actiones,
debtes, obligationes, guidis moveable and unmoveable, and
uthers whatsomever whilkis pertinit to him, sould and aught
appertaine to our soverane Lord, and to be applyit to his Hie-
nes use, be reason of escheat of forfaltour, to be uptaken,
usit, and disponit, be his Hienes at his pleasur; upon the
qlkes premisses, Mr Robert Crichtoun of Elliot†, Advocat to
our soverane Lord, asked instruments, and acts of Court.—
Extractum ex actis ‡ curie Justiciarie antedictæ, per me Wm
Stewart juniorem, notarium publicum et clericum dicte curie
per commissionem S. D. N. regis antedicti. specialiter electum
et juratum, &c. sub meis signo et subscriptione manualibus.

No. VI.

Expençe of burning a Witch, A. D. 1649.

I am indebted for this curious paper to the polite and ob-
liging communication of Mr. William Henderson of the Glass-

* The sentence was changed to beheading, and he was private-
ly buried. Spottiswood's Hist. p. 314.

† Mr Robert Crichton of *Elliock* (for so it should have been ex-
pressed) and Cluny, was father to the Admirable Crichton, and
to Sir Robert Crichton of Cluny, who is mentioned above in the
trial of the Laird of McGregor.

‡ S. L. Stewart's Collection, p. 69.

1649 house, Glasgow, a descendant of Mr. Logan of Burncastle, on whose lands the unhappy sufferer lived. The accompt is a voucher of a payment made by Alexander Louddon, factor on the estate of Burncastle, the proprietor being then a minor and infant. It is entered in the factor's books thus.

‘ Mair for Margarit Dunhome the time sche was in prison,
‘ and was put to death, 065 : 14 : 4.’

*Count gifn out be Alexander Louddon in Lylstoun, in ye yeir of
God 1649 yeiris, for Margrit Dollmoune in Burncastell.*

| | | |
|---|---------|-------------------|
| Item, in ye first, to Wm. Currie and Andrew Gray for
the watching of hir ye space of 30 days, inde ilk
day, xxx sh inde | - - - - | xlvi lib Scotts |
| Item mair to Jon Kinked for brodding of her | - - - - | vi lib Scotts |
| Mair for meat and drink and wyne to him and his man | - - - - | iiij lib Scotts |
| Mair for cloth to hir | - - - - | iiij lib Scotts |
| Mair for twa tare treis | - - - - | xl sh Scotts |
| Item mair for twa treis, and ye making of them, to the
warkmen | - - - - | iiij lib Scotts |
| Item to ye hangman in Hadingtoun, and fetchin of him,
thrie dollores for his pens, is | - - - - | iiij lib xiiii sh |
| Item mair for meit and drink and wyne for his intertinge | - - - - | iii lib Scotts |
| Item mair fer ane man and twa horse, for ye fetcheing of
him, and taking of him hame agane | - - - - | xl sh. Scotts |
| Mair to hir for meit and drink ilk ane day, iiij sh the
space of xxx dayes, is | - - - - | vi lib Scotts |
| Item mair to ye twa officers for yr sic ilk day sex shilline
aught pennies, is | - - - - | x lib Scotts |
| Summa is iiij scoir xii lib xiiij sh | | |

Ghilbert Lauder.

Um. Lauder Bilzaurs.

Takin of this above written soume twentie-seaven pundis Scotis qlk the said
umql Margrit Dinham had of her ain.

92 : 14 : —

27 : — : —

65 : — : —

I N D E X.

- ADULTERY**, Trials for, from p. [351](#), to [359](#).
Aikenhead, Thomas, tried for blasphemy, p. [362](#).
Anderson, John, George Clerk and John Ramsay tried for his murder, p. [160](#).
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1566 use hir libertie in the mean tyme: Lykas, also, she had bin haldin be them in prison as yit, maist treasonable and wickitlie, had not bein that be the provisione of God, she yrafter fred and delyverit hirselfe furth of yr hands in maist sober and quiet maner under silence of nyt, and with greyte hasart of hir lyfe past to her castell of Dumbar for saifetie thereof; and this they did upon set purpose, provisioun, and foirthrowght felony, and therfor dome wes given and pronouncit be the mouthe of the Dempster of the sd court, at comand of the sd Justice-depute, that the sd Thomas should be hangit while he were deid, drawin, quarterit, and demaneit, as ane traitour, and all his guidis, moveable and unmoveable, lands, heretages, a-rents, takis, offices, steidings, possessiones, and uthers whatsomever, to be forfaitit and escheat to our soverane Ladyes use, at her pleasure.*

Henrie Yair † delaittit of Treasone following.

A S S Y S E.

Lawrence Symson burges of Edinburgh, John Gilbert goldsmith, Thomas Ewing goldsmyth, Gilbert Scougall, Capt. Robert Lawder, Robert Ker mert. in Edinburgh, Alexander Haistie ther, John Watson mert. ther, James Forret ther, Edward Litle mert. ther, William Andersone candlemaker, Alexr Bruce in Edinburgh, Allan Dickiesone ther, W^m Rae cutler, Robert Eviot in Mrtoun.

* ‘Sir Ludovick Steuart of Kirkhill, Advocate, his Collectiones, &c. ex manuscriptis Roberti Mylne.’ MS. Advocates Library, p. 74. There is another MS. copy of Sir L. Steuart’s Collection in the Advocates Library, but this is by far the most correct.—The Records of Justiciary, from 10th May, 1559, to 2d March, 1568, are missing.

† Henry Yair had been a priest who had renounced the Catholic religion, and been admitted a retainer of Lord Ruthven’s. Keith’s History, p. 334.

The qlke day the said Henry Yair was convict and fyllit 1566 be ane assyse, of airt and part assistance, fortifieing, supplying, ratihabitone, and concealling of the treasonable conspiracie, convocatione, and gaddering of our soveranes leigis, to the number of fyve hundreth persones, boddin in fear of wear, alseweill in secreit armour as with jacks, steill bonnetes, gunes, pistolets, swords, buklers, Jedburgh staves, halberts, and others waipons invasive, and entering therewith treasonable wtin yr Majesties pallice of Hallyruidhous, purposlie to have put violent hands in our soverane Ladyes maist nobill persone, halden and demaneit the samyne at yr pleasure; and sicklyke, to have slane or otherwise demaneit as they thought expedient, the Lords of hir Hienes Secreit Counsall and Sessione, and others hir ministers and officers being within hir pallace, and in her service for the tyme, and that upon the nynth day of March last bypast, under silence of night, at aught houres at even, or yrby, it being the tyme of parliat current; and for performing this yr maist wicked and ungodlie purpose, they then maist treasonable rushit and enterit within yr said pallace, tuike the samen at yr own hand, rest the keys theirow fra the porters, closit the yetis, and made themselves as principalls and maisters yrintill, our soverane Lady being for the tyme in her maist secreit chamber yrof att hir quietnes, having na feir nor dreidow of hir subjects, to whom hir Grace at all tymes hade been maist beneficiall, guid, and merciful, and yr maist crewallie, with drawin swords, whingers, bended pistolls, and others wapones invasive, persewit and invaidit umqll secretar David Riccio, hir Hienes famailiar servand, yn in companie within hir Hienes chalmer forsaid, and slew him treasonable and unmercifullie, in presence of our said soverane, and pat violent hands in our soverane Ladyes maist nobill persone, in defence and saiftie off the said umqll David, held, detainit, and pressit, the samen maist awfullie and treasonable, till they had comitit ye said slaughter in hir presence, as said is, hir Majestie being then great with chyld, givean to hir Hienes occasioun, throw drow and displeasure she consaveit be the sight of the said crewall slaughter, and maner yrof, and be the detain-

